

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 14,239

FILED MAY -1 1958

988

Joseph W. Stewart

CLERK

DAVID E. MACKEY,

Petitioner,

v.

UNITED STATES OF AMERICA

and

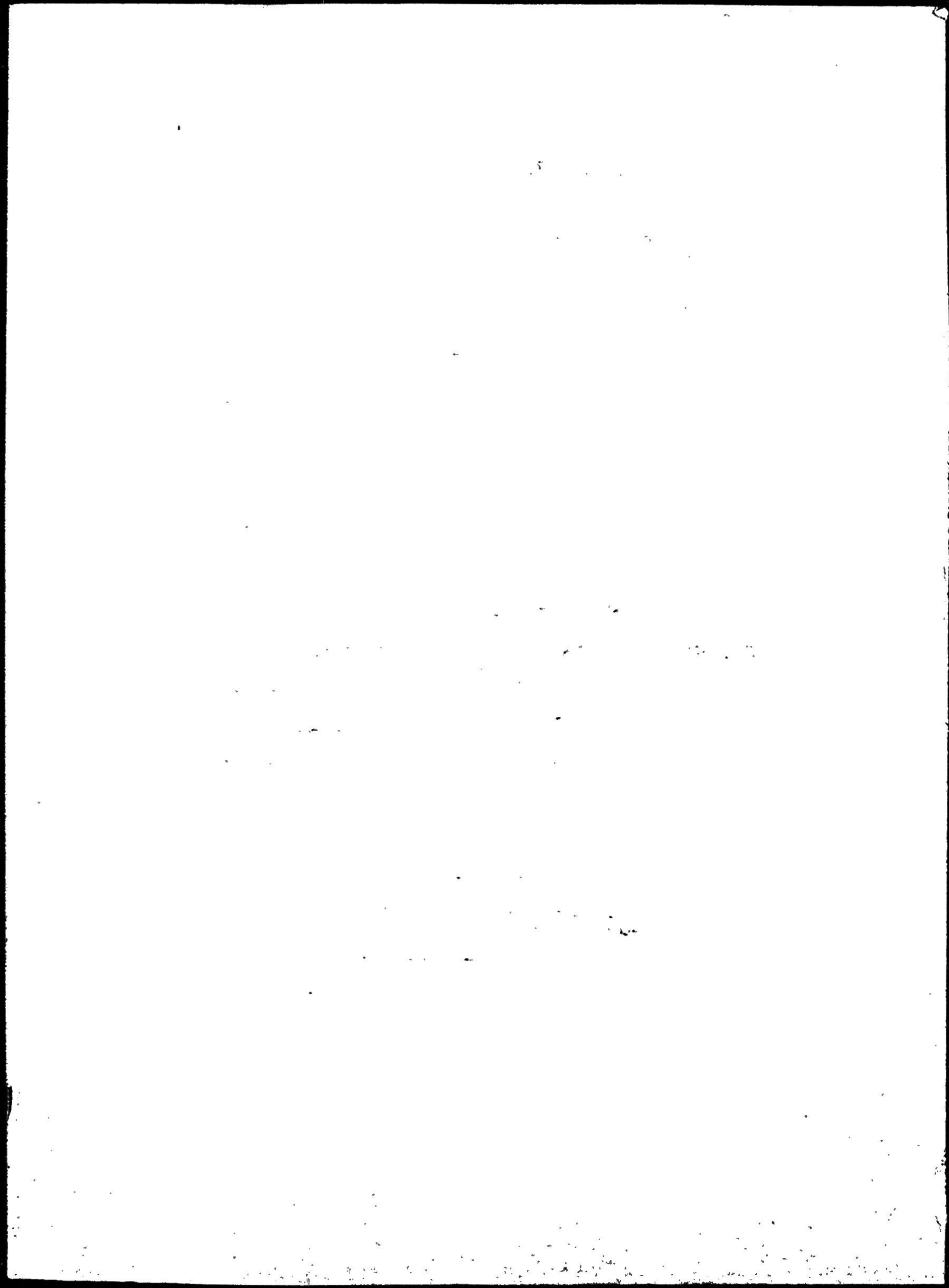
FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

NATIONAL BROADCASTING COMPANY, INC.,

Intervenor.

PETITION TO REVIEW ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION



UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14, 239

DAVID E. MACKEY,

Petitioner,

v.

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,

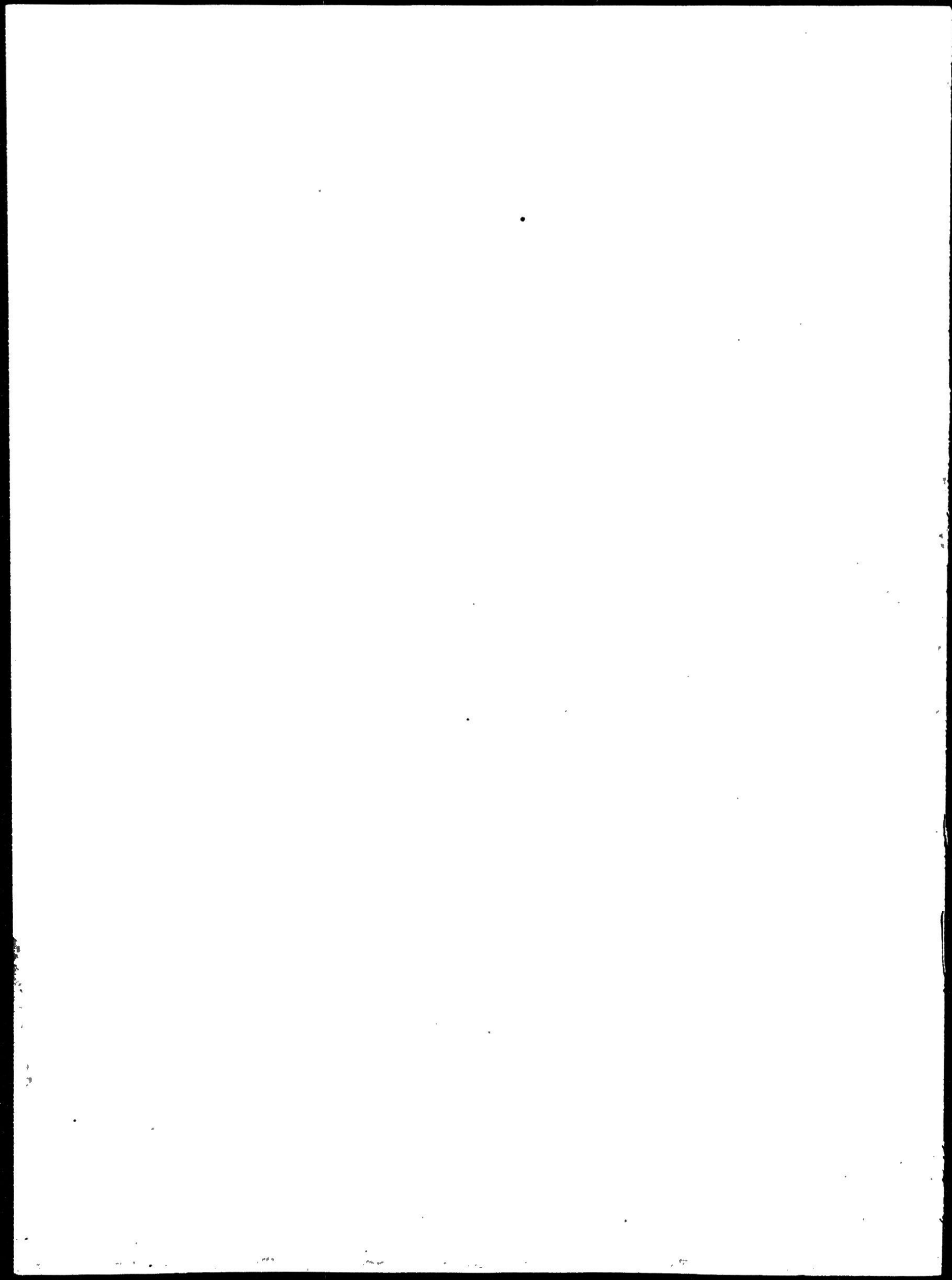
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JOINT APPENDIX



(i)

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JOINT APPENDIX

[Filed January 8, 1958]

UNITED STATES COURT OF APPEALS**For The District Of Columbia Circuit****DAVID E. MACKEY,**

Petitioner)

v.)

Case No. 14239)

UNITED STATES OF AMERICA, and)**FEDERAL COMMUNICATIONS**)**COMMISSION,**)

Respondents)

NATIONAL BROADCASTING COMPANY,)**INC.,**)

Intervenor)

STIPULATION**Counsel for the respective parties herein stipulate as follows:****1. The question presented in this case is as follows:**

To determine whether the Federal Communications Commission was arbitrary and capricious, and violated Sections 303(f), 303(r), and 307(b) of the Communications Act of 1934, as amended, Sections 4(d) and 6(d) of the Administrative Procedure Act, and Commission Rules 1.701, 1.702, and 1.729, by denying petitioner's request for the institution of a rule making proceeding to determine whether the table of television channel assignments in Commission Rule 3.606(b) should be amended so as to delete television channel 3 from Philadelphia, Pennsylvania, and to add channel 3 to Atlantic City, New Jersey. *

2. Petitioner's printed brief will be served and filed on or before February 18, 1958. The printed briefs of respondents and intervenor will be served and filed on or before April 1, 1958. Any printed reply brief will be served and filed on or before

*** None of the parties hereto concedes the correctness of any factual or legal premises implicit in this formulation of the issue.**

April 15, 1958. The joint appendix will be served and filed on or before April 15, 1958.

3. The joint appendix shall contain all of the pleadings filed by the parties herein before the Commission and contained in the record, and the Memorandum Opinion and Order of the Commission released September 30, 1957. The briefs of the parties shall, when referring to record material, indicate the page or pages in the original record where such material may be found. The pages of the joint appendix shall be consecutively numbered and shall, in addition, show appropriate record pagination so that the references to the record material printed in the joint appendix may be found readily.

Respectfully submitted,

/s/ Arthur Scharfeld

Arthur Scharfeld, Esquire

* * *

Counsel for David E. Mackey

/s/ Richard A. Solomon

Richard A. Solomon, Esquire

* * *

Counsel for Federal Communications
Commission

/s/ James E. Greeley

James E. Greeley, Esquire

* * *

Counsel for National
Broadcasting Company,
Inc.

/s/ Daniel M. Friedman

Daniel M. Friedman, Esquire

* * *

Attorney for United States of America

Dated: January 7, 1958

[Filed January 8, 1958]

Before: Burger, Circuit Judge, in Chambers

ORDER

Upon consideration of the prehearing stipulation submitted by the parties to the above case, it is

ORDERED that the aforesaid stipulation be approved and that the Clerk be, and he is hereby directed to file said stipulation forthwith.

It is **FURTHER ORDERED** that the prehearing stipulation be printed in the joint appendix and shall control further proceedings in this case unless modified by further order of this Court.

Dated: January 8, 1958

[1]

[Received Feb. 28, 1957, FCC]

Law Offices
SCHARFELD & BARON
National Press Building
Washington 4, D. C.

* * *

* * *

February 27, 1957

Miss Mary Jane Morris, Secretary
Federal Communications Commission
Washington 25, D. C.

Dear Miss Morris:

There are transmitted herewith fifteen copies of a "Petition to Move Channel 3 from Philadelphia, Pennsylvania, to Atlantic City, New Jersey" on behalf of David E. Mackey.

Should any questions arise in connection with this matter, please communicate directly with this office.

Very truly yours,
SCHARFELD & BARON
By /s/ Theodore Baron
Attorneys for David E. Mackey

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington 25, D. C.

In the Matter of)
 Amendment of Section 3. 606)
 Table of Assignments)
 Television Broadcast Stations)
 (Atlantic City, N. J. - Philadelphia, Pa.))

**PETITION TO MOVE CHANNEL 3 FROM PHILADELPHIA,
 PENNSYLVANIA, TO ATLANTIC CITY, NEW JERSEY**

David E. Mackey, permittee of Station WOCN(TV) (Channel 52) at Atlantic City, New Jersey, respectfully requests that the Commission institute a rule making proceeding to amend the television Table of Assignments in Rule 3. 606(b) to delete Channel 3 from Philadelphia, Pennsylvania, and to add Channel 3 to Atlantic City, New Jersey.

The State of New Jersey Has No Television Stations

1. The State of New Jersey ranks 8th in population among the United States, with 4, 835, 329 people (1950 Census), but it has no television stations. Station WATV, Newark, is only nominally a New Jersey station. WATV is located in the New York City Metropolitan Area, its sales office is located at 575 Madison Avenue in New York City, and its transmitter is located on the Empire State Building in New York City. Furthermore, WATV is regarded by the broadcasting industry as a New York station. Thus, the Television Station Directory of the 1956 Fall-Winter Edition (No. 23) of "Television Factbook" contains the following listing for WATV, at page 150:

'NEW JERSEY

WATV, NEWARK
(See New York, N. Y.)"

Thus, also, the station directory of Broadcasting-Telecasting (1955-1956) "Telecasting Yearbook-Marketbook Issue" contains the following

listing for WATV, at page 178:

[3]

-----"New Jersey"-----

* * * * *

NEWARK
(Essex County)

WATV (TV) (NEW YORK, N. Y.) * * *

The Lack of Television Stations in New Jersey is the Proximate Result of the Commission's Table of Assignments

2. The State of New Jersey does not lack television stations because there have been no potential broadcasters. On the contrary, stations were constructed and operated at Asbury Park (WRTV, Channel 58) and Atlantic City (WFPG-TV, Channel 46); both stations ceased operations because of economic losses and competitive hopelessness. Two construction permits have been relinquished (WDHN, New Brunswick, Channel 47; WTTM-TV, Trenton, Channel 41), and three construction permits are outstanding for stations which have not been built.

3. The absence of television broadcasting in New Jersey has resulted from the allocation in 1952 by means of Rule 3.606(b) of 14 UHF assignments (and the Newark VHF assignment) to a State blanketed many years before 1952 with VHF television signals from stations located in adjoining States - primarily, stations in New York, New York, and Philadelphia, Pennsylvania. In the rule making proceeding leading to the "Sixth Report and Order," at least one New Jersey party predicted and fought against the present state of television in the State of New Jersey by urging the assignment of additional VHF channels to the State. * (See pleadings of Mercer Broadcasting Company in Dockets 8736 et al.) However, the "Sixth Report and Order" rejected this position on the ground that the UHF band would be fully utilized because

VHF

*Alternatively it was urged that all commercial television broadcasting be assigned to the UHF portion of the spectrum in order to avoid many of the economic and competitive problems which would arise if television broadcasting were authorized in both the VHF and UHF bands. (See paragraph 25, "Sixth Report and Order," 1 (Part 3) RR 91:607-8)

[4]

was not a "fully matured competing service." (Par. 197, 1 (Part 3) RR 91:664) It is clear from the Commission's Report and Order in Docket 11532 and the various recent "deintermixture" proceedings that the Commission now recognizes that UHF has not been satisfactorily utilized in areas served by VHF stations established before, or contemporaneously with, UHF stations and assignments. For allocation purposes in areas such as New Jersey, VHF and UHF are as different from each other as AM and FM radio broadcasting facilities are different from each other.

The Status of Television in New Jersey Is Grossly Inferior to the Status of Television in Neighboring States

4. In contrast to the allocation of 1 VHF and 14 UHF channels to the State of New Jersey, the neighboring State of New York has allocated to it 19 VHF and 47 UHF channels, while the neighboring State of Pennsylvania has allocated to it 11 VHF channels and 48 UHF channels. New York now has 18 VHF stations (including two stations sharing time, but not including WATV) and 6 UHF stations (including one satellite station) in operation. Pennsylvania now has 9 VHF stations and 15 UHF stations in operation.

5. There is no reasonable basis for the severe disproportion in the allocation of VHF channels among the States of New Jersey, New York, and Pennsylvania. According to the 1950 U. S. Census, New York ranked Number 1 among the States in population with 14, 830, 192 people; Pennsylvania ranked Number 3 with a population of 10, 498, 012;

and New Jersey ranked Number 8 with a population of 4, 835, 329. Thus, the population of the State of New Jersey is approximately one-half the population of the State of Pennsylvania, and approximately one-third the population of the State of New York. In area, New Jersey has 7, 836 square miles, Pennsylvania has 45, 333 square miles, and New York has 49, 576 square miles. Thus, New Jersey is approximately one-sixth the size of Pennsylvania, and is between one-sixth and one-seventh the size of New York.

[5]

6. Petitioner maintains that there are no qualitative differences between the State of New Jersey on the one hand and the States of Pennsylvania and New York (or any other States in the Union) on the other hand which affect adversely New Jersey's right to a fair and equitable share of television channels, under the provisions of Section 307(b) of the Communications Act of 1934, as amended. Petitioner further maintains that there are no circumstances peculiar to the State of New Jersey which make it less worthy than other States of having apportioned to it a fair and equitable share of the useful, effective, and distinctive VHF television channels, and that the people of the State of New Jersey are ready, willing, and able to make use of VHF television channels if they are made available to them. As a matter of fact, it is now undoubtedly clear to the Commission that New Jersey is an area which especially requires the allocation of VHF television channels rather than UHF channels under Section 307 (b) of the Communications Act because of the pre-1952 service to the State from VHF television stations located outside the State.

Rule 3. 606(b) Is Contrary to Law to the Extent That It Assigns Only One VHF Television Channel to New Jersey (at Newark)

7. As the Commission recognized in the "Sixth Report and Order," the allocation of television channels in Rule 3. 606(b), the "Table of Assignments," must conform to the requirement of

Section 307(b) of the Communications Act that broadcast facilities be distributed 'among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.' It was also recognized in the "Sixth Report and Order" that the Commission has a continuing responsibility to see to it that broadcast facilities are distributed fairly, efficiently, and equitably among the states and communities. Thus, paragraph 13 of the "Sixth Report and Order" reads as follows:

[6]

"13. The Communications Act of 1934, among other things establishes as a responsibility of the Commission the 'making available to all people of the United States, an efficient, nationwide, radio service,' (Section 1), and the effectuation of the distribution of radio facilities in such a manner that the result is fair, efficient and equitable and otherwise in the public interest from the standpoint of the listening and viewing public of the United States (Sections 303 and 307b). Our conclusion that these standards can best be achieved by the adoption of a Table of Assignments is based upon three compelling considerations:

* * *." (1 (Part 3) RR 91:604)

8. It is also clear that Section 307(b) of the Act requires that the standard of equitable, efficient, and fair distribution of broadcast facilities applies to transmission as well as to reception of broadcast service. Thus the Commission stated at paragraphs 78 and 79 of the "Sixth Report and Order":

"78. * * * The DuMont view is that emphasis should be placed on locating the assignments, particularly VHF channels, so that the largest number of people will have television service but not necessarily that the largest number of communities should have one or more television stations of their own. 18/ * * *

"79. The Commission, on the other hand, believes that on the basis of the Communications Act it must recognize the importance of making it possible with any table of assignments for a large number of communities to obtain television assignments of their own. In the Commission's view as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs. * * *" (Id. at 91:624)

9. As shown above, the assignment of VHF channels to New Jersey is, and was in 1952, adversely disproportionate to that State in relation to the other States. How, then, could the Commission justify its allocation of channels to New Jersey in 1952? It rejected the plea for more VHF channels for New Jersey on the basis of a prediction of success for UHF telecasting which has not materialized in New Jersey, as follows:

"195. In arguing that Section 307(b) of the Communications Act required the Commission to make separate and distinct assignments of VHF and UHF channels, * * * They contend that since there are admitted differences between VHF and UHF television facilities, as in the case of FM and AM, the holding in the Easton case must be construed as requiring the Commission to assign the VHF and UHF facilities independently.

* * * *

[7]

"197. Because television is in a stage of early development and the additional consideration that the limited number of VHF channels will prevent a nationwide competitive television service from developing wholly within the VHF band, we are convinced that the UHF band will be fully utilized and that UHF stations will eventually compete on a favorable basis with stations in the VHF. The UHF is not faced, as was FM, with a fully

matured competing service. In many cases UHF will carry the complete burden of providing television service, while in other areas it will be essential for providing competitive service. In view of these circumstances, we are convinced that stations in the UHF band will constitute an integral part of a single, nationwide television service." (1 (Part 3) 91:664)

10. It is of secondary importance in this pleading whether the Commission's action was lawful or wise in 1952. It is vastly important, however, that the facts which have emerged from five years of experience under the Table of Assignments adopted in 1952 demonstrate conclusively that Rule 3.606(b) as it stands on the books today is contrary to Section 307(b) of the Communications Act: It does not distribute television channels fairly and equitably among the several states because New Jersey does not have more than one VHF channel assigned to it. (And the one VHF channel assigned is located in the New York City Metropolitan Area so as to compel it, practically, to operate in many respects as a New York City station.) The failure of UHF to develop in such areas as New Jersey into a reasonably effective telecasting medium removes the only possible basis of legality for the present allocation of VHF television channels to the State of New Jersey.

Move Channel 3 from Philadelphia to Atlantic City

11. Although petitioner does not maintain that the assignment of one VHF channel to Atlantic City will in itself give the State of New Jersey all of the VHF channels to which it is fairly and equitably entitled under the law, petitioner maintains that the addition of a VHF channel to Atlantic City will be a step in the direction of curing the defect in Rule 3.606(b) with respect to New Jersey, and is required in the public interest

under the Communications Act. One of the results of the Commission's assignments of VHF channels to New York, New York, and Philadelphia,

Pennsylvania, at the expense of New Jersey is the fact that A VHF channel may not now be assigned to Atlantic City in accordance with the Commission's technical Rules without making changes in existing VHF television assignments. (See attached engineering affidavit.) As shown in the attached engineering affidavit, Channel 3 can be assigned to Atlantic City, if deleted from Philadelphia where it is presently assigned, in compliance with the mileage separation rules of the Commission.

SUMMATION

12. The State of New Jersey, ranking 8th in population among the United States, has no television stations. (Station WATV, Newark, is only nominally a New Jersey station.) The absence of television stations in New Jersey is the proximate result of the Commission's Table of Assignments (Rule 3.606(b)), which assigned only 1 VHF channel (Newark) and 14 UHF channels to New Jersey - a State which was blanketed, many years before the 1952 allocation of channels, with VHF television signals from stations in New York City and Philadelphia. Attempted UHF operations in New Jersey were discovered to be economically hopeless because of the entrenched VHF coverage of the State.

13. In proportion to relative population and size, the State of New Jersey has been unfairly and inequitably treated, contrary to law, in the allocation of VHF television channels among the States - especially the neighboring States of New York and Pennsylvania. New York has allocated to it 19 VHF and 47 UHF channels; it has 18 VHF stations and 6 UHF stations in operation. Pennsylvania has allocated to it 11 VHF channels and 48 UHF channels; it has 9 VHF stations and 15 UHF stations in operation.

14. In the "Sixth Report and Order" of 1952, the Commission justified as fair and equitable under Section 307(b) of

and Pennsylvania at the expense of New Jersey on the ground that UHF would become a competitive service, in spite of pre-existing VHF service. The history of the past five years conclusively refutes the Commission's prediction of 1952, and the allocation of television channels to New Jersey is now clearly in violation of the law, which requires fair and equitable distribution of television facilities among the several states and communities.

15. The addition of a VHF channel to Atlantic City would be a step toward curing the violation of law contained in the Table of Assignments. Because of the Commission's past allocations, no VHF channel can be added to Atlantic City without deletion of a present VHF assignment. Channel 3 can be assigned to Atlantic City if deleted from Philadelphia.

WHEREFORE, petitioner respectfully requests that the Commission institute a rule making proceeding to amend the television Table of Assignments in Rule 3.606(b) to delete Channel 3 from Philadelphia, Pennsylvania, and to add Channel 3 to Atlantic City, New Jersey.

Respectfully submitted,

DAVID E. MACKEY

By /s/ Arthur W. Scharfeld

/s/ Theodore Baron

Scharfeld & Baron
His Attorneys

* * *

February 27, 1957

[10]

VANDIVERE, COHEN and WEARN
Consulting Electronic Engineers
Washington, D. C.

**ENGINEERING STATEMENT IN SUPPORT OF PETITION
TO AMEND SECTION 3.606 TABLE OF ASSIGNMENTS
OF THE RULES OF THE FEDERAL COMMUNICATIONS
COMMISSION**

Jules Cohen, being first duly sworn, says that he is a member of the firm of Vandivere, Cohen and Wearn; that he is a professional engineer registered in the District of Columbia and the Commonwealth of Virginia, and that his qualifications as an expert in engineering are a matter of record with the Federal Communications Commission. The firm of Vandivere, Cohen and Wearn has been retained by David E. Mackey, permittee of Television Station WOCN, Atlantic City, New Jersey, to provide engineering services relative to the assignment of a VHF television channel to Atlantic City.

An engineering study made on behalf of David E. Mackey indicates that a VHF channel may not be assigned to Atlantic City in accordance with FCC Rules without making changes in existing VHF television assignments. The engineering study further indicates that Channel 3 could be employed at Atlantic City in compliance with the mileage separation rules of the FCC if that channel is deleted from Philadelphia, Pennsylvania.

The Channel 3 assignments closest to Atlantic City (excepting Philadelphia) are at Hartford, Connecticut, where Travelers Insurance Company holds a construction permit, and

[11]

Norfolk, Virginia (WTAR-TV). The distance from Atlantic City to Hartford, Connecticut, is 190 miles, and the distance from Atlantic City to the site proposed for employment by Travelers Insurance

Company is 187 miles. The distance from Atlantic City to the WTAR-TV transmitter is 208 miles. The minimum separation requirement of the FCC Rules applicable to Zone 1, wherein Atlantic City, Hartford and Norfolk are located, is 170 miles. The closest adjacent channel operation is that of WMAR-TV operating on Channel 2 at Baltimore, Maryland. The distance from Atlantic City to Baltimore, Maryland, is approximately 115 miles--55 miles in excess of the minimum permitted spacing of 60 miles.

/s/ Jules Cohen

VANDIVERE, COHEN and WEARN

Jurat dated February 20, 1957.

[12]

[Received March 12, 1957, FCC]

**OPPOSITION OF NATIONAL BROADCASTING COMPANY,
INC. TO PETITION TO MOVE CHANNEL 3 FROM PHILA-
DELPHIA TO ATLANTIC CITY, NEW JERSEY**

National Broadcasting Company, Inc. (NBC), licensee of Television Station WRCV-TV, Philadelphia, Pennsylvania, which operates on Channel 3, opposes the petition for rule-making filed by David E. Mackey on February 27, 1957, and requests that the petition be dismissed.

The Mackey petition requests that the Commission eliminate Channel 3 from Philadelphia -- the 4th most populous market in the United States -- and that the channel be assigned to Atlantic City, New Jersey, the 147th market in the country. The population of the Philadelphia metropolitan area is 3,671,048 and the population of the Atlantic City metropolitan area is 132,399. The population of Philadelphia is 2,071,605 and the population of Atlantic City is 61,657. *

* The source of market and population data used in this pleading is Sales Management of 1956 and the U. S. Census of 1950 unless otherwise indicated.

[13]

Channel 3 has been the source of commercial television service for the Philadelphia metropolitan area since September, 1941. The station operating on that channel, now known as WRCV-TV, was the first in Philadelphia and has continuously afforded to viewers in parts of New Jersey, Delaware and Pennsylvania the NBC Television Network service since that network service commenced.

At the present time, WRCV-TV provides more than 125 hours a week of television service to approximately 6, 321, 494 persons who reside within the Grade B contour of the station.

Petitioner is a permittee of WOCN on Channel 52 at Atlantic City, New Jersey. This grant was originally made on January 7, 1953. Petitioner acquired the construction permit at a cost of slightly more than \$10,000 on April 24, 1954. (See File, BMPCT-3631)

The Petition Is Based Upon Fallacious And Illogical
Premises And Should Be Dismissed

The underlying thesis of this petition is that the Commission's Table of Allocation (Section 3.606) violates Section 307(b) of the Communications Act because it fails to make separate allocation of VHF and UHF channels among the several states. This failure, petitioner says, has resulted in inequitable and illegal allocation of VHF channels. It is

[14]

worthy of mention that if petitioner is sustained, the whole structure of present day television is in jeopardy because it is based upon a Table of Allocations which allocates all channels (VHF and UHF) as a unit and not upon two plans - one for VHF and one for UHF.

Petitioner's argument is not a new one. It was thoroughly briefed, argued and considered prior to the issuance of the Sixth Report and Order. The Commission concluded in that Report as follows:

" . . . The Assignment Table proposed in the Third Notice and the Assignment Table adopted herein make a wide dispersal of both VHF and UHF channels among the states and communities. We must, however, reject the contention of the parties that Sec. 307(b) requires the Commission to treat VHF channels as completely different from UHF channels in making an Assignment Table. We think it clear that the fair, efficient and equitable distribution required by the Communications Act has reference to over-all distribution within any given radio service and not with respect to every type of station within a service. *Federal Radio Commission v. Nelson Brothers Bond and Mortgage Company*, 289 U. S. 266, at 281. In the case of television, stations operating in the UHF and VHF bands, although marked by distinguishing characteristics, will together constitute an integrated television service. We have concluded, therefore, that the requirements of the Act can best be met by an over-all Table of Assignments, which includes within its scope all channels which will be utilized in the television service." 1 RR 91:663 (Emphasis supplied)

The authority of the Commission to adopt the nationwide allocation plan contained in Section 3.606 of its rules and the fact that this particular plan, which acknowledges different characteristics of UHF and VHF channels yet allocates all

[15]

channels (UHF and VHF) as a unit, is not in violation of Section 307(b) has been confirmed by the Court of Appeals for the District of Columbia. *Peoples Broadcasting Company v. U.S.*, 209 F.2d 286 (1953); *Logansport Broadcasting Corp. v. U.S.*, 210 F.2d 24 (1954).

The recent "deintermixture" proceedings relied upon by the petitioner in actuality support the proposition that VHF channels do not have to be considered separately for purpose of allocation. By its very

nature "deintermixture" connotes the removal of all or substantially all VHF channels from an area. The purpose is to foster the growth and development of UHF. One result, however, is the antithesis of an equitable allocation of VHF channels considered alone among the several states and communities.

As the instant petition is grounded on an alleged violation of law and as that contention has been demonstrated to be erroneous, it is respectfully requested that the petition be dismissed.

Assuming arguendo that the Commission does have an obligation to equitably distribute VHF channels considered alone among the several states and communities, nonetheless, this petition should be dismissed. Petitioner argues that Pennsylvania has been more favorably treated than New Jersey. From this general argument he concludes that Philadelphia (presumably because it is in Pennsylvania) should be deprived

[16]

of a VHF channel. This does not follow.

Regardless of what petitioner might prove with respect to the general situation in the State of Pennsylvania, there is no surplusage of VHF assignments to Philadelphia. It might be well to recall that in devising its plan the Commission specifically stated that:

" . . . VHF can effectively cover large areas and VHF was used wherever possible in larger cities since such cities have broad areas of common interest . . . Thus the Commission concluded that in order to achieve an equitable distribution of facilities, metropolitan centers with their large aggregations of people should be assigned more VHF channels than communities comprising fewer people." 1 RR 91:621.

Philadelphia is the largest city in the State of Pennsylvania and it is the fourth largest in the country. Philadelphia has been no more favorably treated than several other smaller metropolitan areas. Without attempting to be exhaustive the following tabulation is exemplary:

<u>Metropolitan Area</u>	<u>Population Rank</u>	<u>No. of VHF Assignments</u>
Philadelphia *	4	4 **
St. Louis	9	4
Washington	10	4
Minneapolis/St. Paul	13	4
Denver	26	4

* The Philadelphia metropolitan area includes Camden, Burlington and Gloucester Counties in New Jersey.

** This includes a channel assigned to Wilmington, Delaware which provides service to the Philadelphia area.

[17]

Furthermore, the Commission gave serious consideration to assigning another VHF channel to Philadelphia in its allocation decision contained in the Sixth Report. 1 RR 91:726--91:728.

Thus, even if petitioner proved his point that Pennsylvania has been more favorably treated than New Jersey, the Commission could not conclude that the largest city in Pennsylvania should be deprived of a pioneer VHF station.

Another contention upon which this petition is based is that because New Jersey is entitled to more VHF channels, a VHF channel should be assigned to Atlantic City which is in New Jersey. It is perfectly evident that this conclusion does not follow as a matter of logic or common sense. In the event that New Jersey is entitled to additional channels, there could well be other locations for such channels within that state. A prima facie case for such other location is made by even a cursory examination of the population distribution. Atlantic City ranks 11th in the state in terms of population. It is located in Atlantic County which also ranks 11th of twenty-one counties in that state.

New Jersey probably has more television service available than any other state in the Union for much of the state receives service

from New York City or Philadelphia, or both. A substantial part of New Jersey lies within the metropolitan areas of New York City and Philadelphia. New Jersey

[18]

has an allocation of 15 channels under the Commission's plan. One station, WATV, Newark, is in operation. In addition, there are four authorizations outstanding -- two of which are for channels assigned to Atlantic City. In this context the contention that the plan is inequitable is without merit.

For the foregoing reasons it is respectfully requested that the petition for rule making be dismissed.

Respectfully submitted,

/s/ Thomas E. Ervin

/s/ Joseph A. McDonald

/s/ James E. Greeley

* * *

March 11, 1957

[19]

(Certificate of Service)

the several States and not because Atlantic City, is, per se, entitled to a Philadelphia channel, or because petitioner has any animus against the licensee of Channel 3 in Philadelphia. The petition also makes clear that Rule. 3.606(b) is contrary to Section 307(b) of the Communications Act as of the present time regardless of whether it was lawful or unlawful in 1952. Nor does the petition attack the Commission's authority to distribute television channels by rule making since, of course, the petition itself invokes the rule making power of the Commission. Petitioner's reference to the recent deintermixture proceedings pointed out that the Commission has, in those proceedings, recognized that UHF has not been a competitively or reasonably equal broadcasting facility in comparison with VHF in areas served by VHF stations established before, or contemporaneously with, UHF stations and assignments.

4. The artful statements in the opposition can not change the fact that the petition is not an attack on the entire television Table of Assignments or the Commission's powers, but

[23]

is limited to the peculiar situation prevailing in the New Jersey-New York-Pennsylvania area in which the entire State of New Jersey has been unlawfully sacrificed to the cities of New York and Philadelphia and the States of New York and Pennsylvania. Nor does the contention in the opposition that Philadelphia is not as favorably treated as some smaller communities with respect to distribution of VHF assignments change the inequitable fact that the one city of Philadelphia in the State of Pennsylvania has more television stations than the entire State of New Jersey because it has more VHF assignments.

5. The possibility of allocating a VHF channel to some other New Jersey city than Atlantic City is irrelevant here. However, it should be noted in passing that there has been evidenced more than adequate "demand" (under Section 307(b) of the Communications Act)

in Atlantic City to justify the requested assignment of Channel 3 in view of the two outstanding construction permits for UHF stations in Atlantic City and the past operation of one (UHF) television station in Atlantic City - which had to be discontinued for competitive reasons.

WHEREFORE, petitioner requests that the opposition of the National Broadcasting Company, Inc. be denied and the requested rule making proceeding be instituted.

Respectfully submitted,

DAVID E. MACKEY

By /s/ Arthur W. Scharfeld

/s/ Theodore Baron

Scharfeld & Baron

His Attorneys

* * *

March 18, 1957

[24]

(Certificate of Service)

[25]

FCC 57-1082 49682

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Ford abstaining from voting.

1. The Commission has before it for consideration a petition filed February 27, 1957, by David E. Mackey, permittee of UHF Station WOCN, on Channel 52 in Atlantic City, New Jersey, requesting rule making to amend the Table of Assignments contained in Section 3.606 of the Rules and Regulations to shift Channel 3 from Philadelphia, Pennsylvania, to Atlantic City. On March 11, 1957, an opposition to the subject petition was filed by National Broadcasting Company, Inc., licensee of Station WRCV-TV on Channel 3 in Philadelphia, and on March 18, 1957, petitioner filed a reply to NBC's opposition.

2. In support of its proposal, petitioner submits that there are no television stations in New Jersey except Station WATV on Channel 13 at Newark, and that this station is in reality a New York City station since it is so considered by the broadcasting industry and its transmitter and sales office are located there. It asserts that this lack of television facilities in New Jersey has resulted from the failure of the Commission to allocate to the State a fair and equitable share of VHF channels; that under the Table of Assignments adopted in 1952 the allocation of 14 UHF channels and but one VHF channel to New Jersey was claimed to be justified on the ground that UHF would become a competitive service, in spite of pre-existing VHF service to the State from stations in New York City and Philadelphia; that the history of the past five years demonstrates that UHF cannot develop in areas, such as New Jersey, which are blanketed by VHF signals from nearby states, and that the Table of Assignments, insofar as it is based on this assumption with respect to the New Jersey assignments, is in violation of Section 307(b) of the Communications Act. Petitioner urges that the addition of a VHF assignment to Atlantic City would represent a step toward fair and equitable treatment of New Jersey in the distribution of television channels, and that while a VHF channel cannot be added to Atlantic City without the deletion of a VHF assignment, it would be technically feasible to assign Channel 3 to Atlantic City if the channel is deleted from Philadelphia.

3. In opposition to the proposal, NBC submits that the proposed shift of Channel 3 from Philadelphia to Atlantic City involves the elimination of a television station on Channel 3 in Philadelphia which has continuously served parts of New Jersey, Delaware and Pennsylvania since September of 1947 and the deletion of a station from the 4th ranking market in the country in order to assign Channel 3 to the 147th market in the country. 1/ It asserts that there is no merit to petitioner's

contention that Section 307(b) of the Communications Act requires VHF and UHF channels to be allocated separately, and that the courts have confirmed the Commission's authority to adopt rules based on an allocation plan which allocates VHF and UHF channels as a unit even though different characteristics for them are recognized. NBC urges that even if VHF channels were required to be allocated separately, no grounds exist for depriving Philadelphia -- the largest city in Pennsylvania and the fourth largest in the country -- of one of its three commercial VHF channels; and that even if New Jersey were entitled to additional VHF channels, as petitioner claims, it does not necessarily follow that a VHF channel should be allocated to Atlantic City, which ranks 11th in New Jersey in size. NBC adds that a substantial part of New Jersey lies within the metropolitan areas of Philadelphia and New York City and that since much of the State receives service from stations in New York City or Philadelphia, or both, more television service is probably available in New Jersey than in any other State.

4. In reply to NBC's opposition, petitioner argues that its basic claim of unfair, inequitable and unlawful treatment of New Jersey in the allocation of television channels among the several states has not been met; that its request for rule making is based on this claim and not because Atlantic City is entitled, per se, to a Philadelphia channel; that its petition does not attack the entire Table of Assignments nor the Commission's powers but is limited to the peculiar television situation prevailing in the New Jersey-New York-Pennsylvania area, where New Jersey has been unlawfully sacrificed to New York City and Philadelphia and their respective States. It notes that Philadelphia has more television stations than the entire State of New Jersey because it has more VHF assignments, and it claims that the possibility of allocating a VHF channel to a New Jersey city other than Atlantic City is irrelevant here. It also notes that the two outstanding UHF construction permits for UHF stations in Atlantic City and the past operation of one UHF station in Atlantic City are adequate evidence of

"demand" under 307(b) of the Act for a local outlet to justify adoption of its proposal.

5. Last June, following an intensive study of the serious television problems which have arisen since the present television allocation plan was adopted in 1952 and after consideration of a vast number of proposals for solving these problems, the Commission released its Report and Order in Docket No. 11532, outlining a long-range program designed to improve the overall television allocation structure and to achieve more fully the objectives of the Sixth Report and Order and the requirements of the Communications Act. Since, as a part of this long-range program, a thorough study of the possibilities of ultimately using the UHF band exclusively, or in a major portion of the United States, for television was planned and the study and

1/ NBC's source of this market data is the U. S. Census of 1950 and Sales Management of 1956. The 1950 Census indicates that Philadelphia is the 4th ranking metropolitan area and Atlantic City the 129th.

[27]

implementation of such a program would necessarily take a number of years, the Commission also gave consideration to what action might be taken in the interim to improve opportunities for more effective competition among a greater number of stations. Accordingly, we have since that time pursued a policy of instituting rule making proposals requesting channel changes in particular areas and communities which appear to provide greater opportunities for television growth and for effective competition among a greater number of stations in the interim, pending a completion of our long-range study.

6. We have examined the subject proposal and the arguments of the parties with respect thereto, and we do not believe that it is one upon which the institution of rule making is warranted. Petitioner's proposal to obtain a VHF channel assignment for Atlantic City is dependent upon deleting Channel 3 from Philadelphia upon which a station

is and has been operating for many years. Philadelphia, with a 1950 population of 2,071,605, and a metropolitan area population of 3,671,648, is the fourth largest market in the country and has been assigned three commercial VHF and four UHF channels, one of which is reserved for educational use. Stations are operating on the three VHF channels and on the UHF channel reserved for educational use.

7. The scarcity of local television outlets in New Jersey and in other areas presents a problem which we are seeking to solve in our long-range program for improvement in the television allocation structure. However, we do not believe that at this time, when we are pursuing the objective of improving the competitive situation in as many communities and areas as possible so as to make more and better television available to the public, we would be justified in removing a television channel from a city of the size and importance of Philadelphia, where it is meeting the public need for service and is necessary to the maintenance of a healthy and effective competitive situation among the stations and networks in that market in order to provide a local outlet in Atlantic City, which is much smaller in size (61,657 population) and in a smaller market (1950 metropolitan area population, 132,399, the 129th ranking market), particularly when we consider that there is no other VHF station in the Atlantic City area with which a Channel 3 station could compete on an equal basis and that Atlantic City receives service from the three Philadelphia stations on Channels 3, 6 and 10 and from the Channel 12 station at Wilmington, Delaware. In our view, this proposal neither presents a practical remedy for alleviating the difficulties which have hindered the establishment of local television outlets in New Jersey and Atlantic City nor serves the public interest by creating improved opportunities for effective competition among a greater number of stations.

8. In view of the foregoing, IT IS ORDERED, That the above-described petition of David E. Mackey of Atlantic City, New Jersey, IS DENIED.

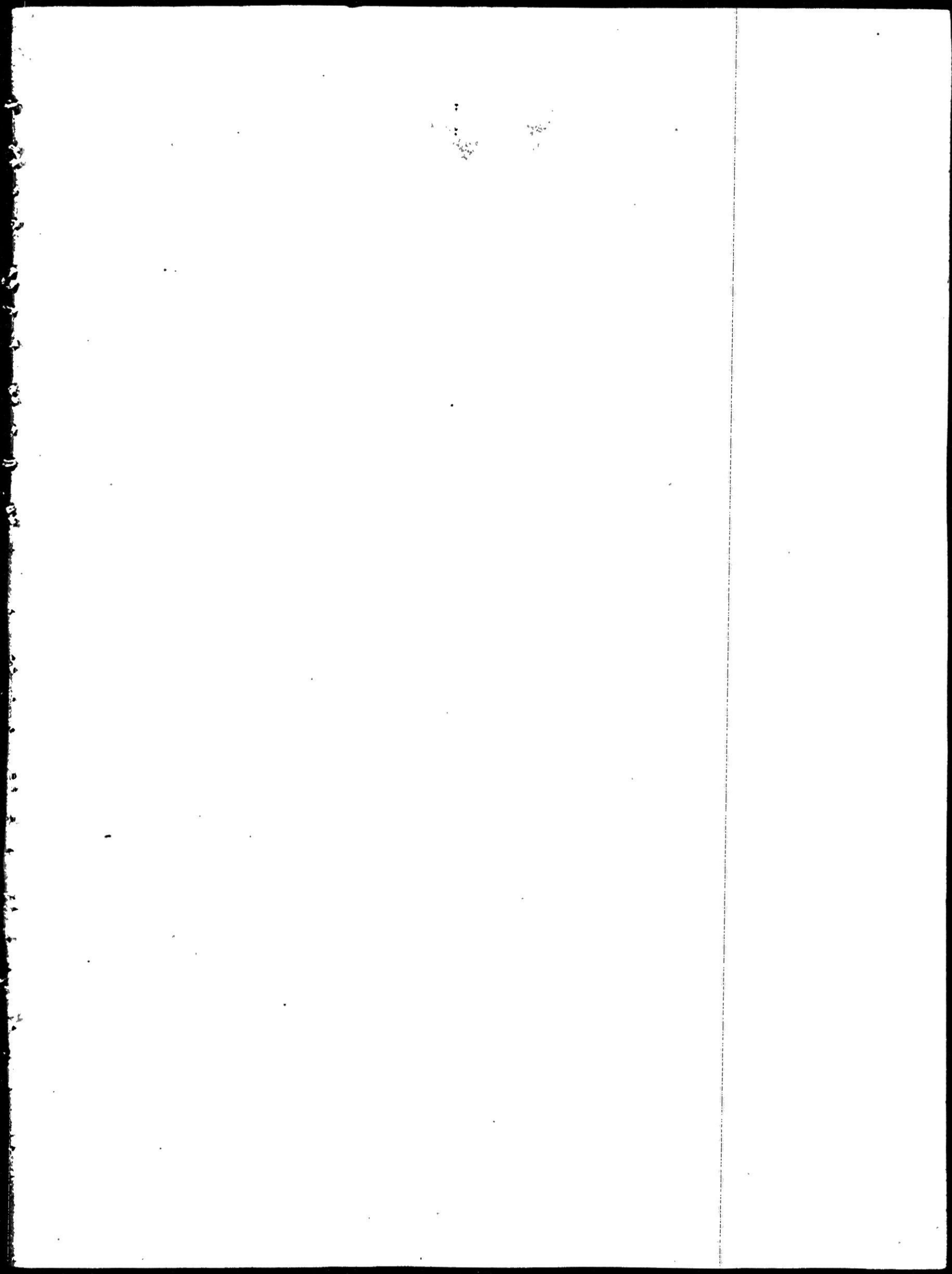
FEDERAL COMMUNICATIONS COMMISSION

Mary Jane Morris
Secretary

(SEAL)

Adopted: September 25, 1957

Released: September 30, 1957



BRIEF FOR PETITIONER

United States Court of Appeals
For the
District of Columbia Circuit
FILED FEB 18 1958
Joseph W. Starnik
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,239

DAVID E. MACKEY,

Petitioner,

v.

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

NATIONAL BROADCASTING COMPANY, INC.,

Intervenor.

**PETITION TO REVIEW ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

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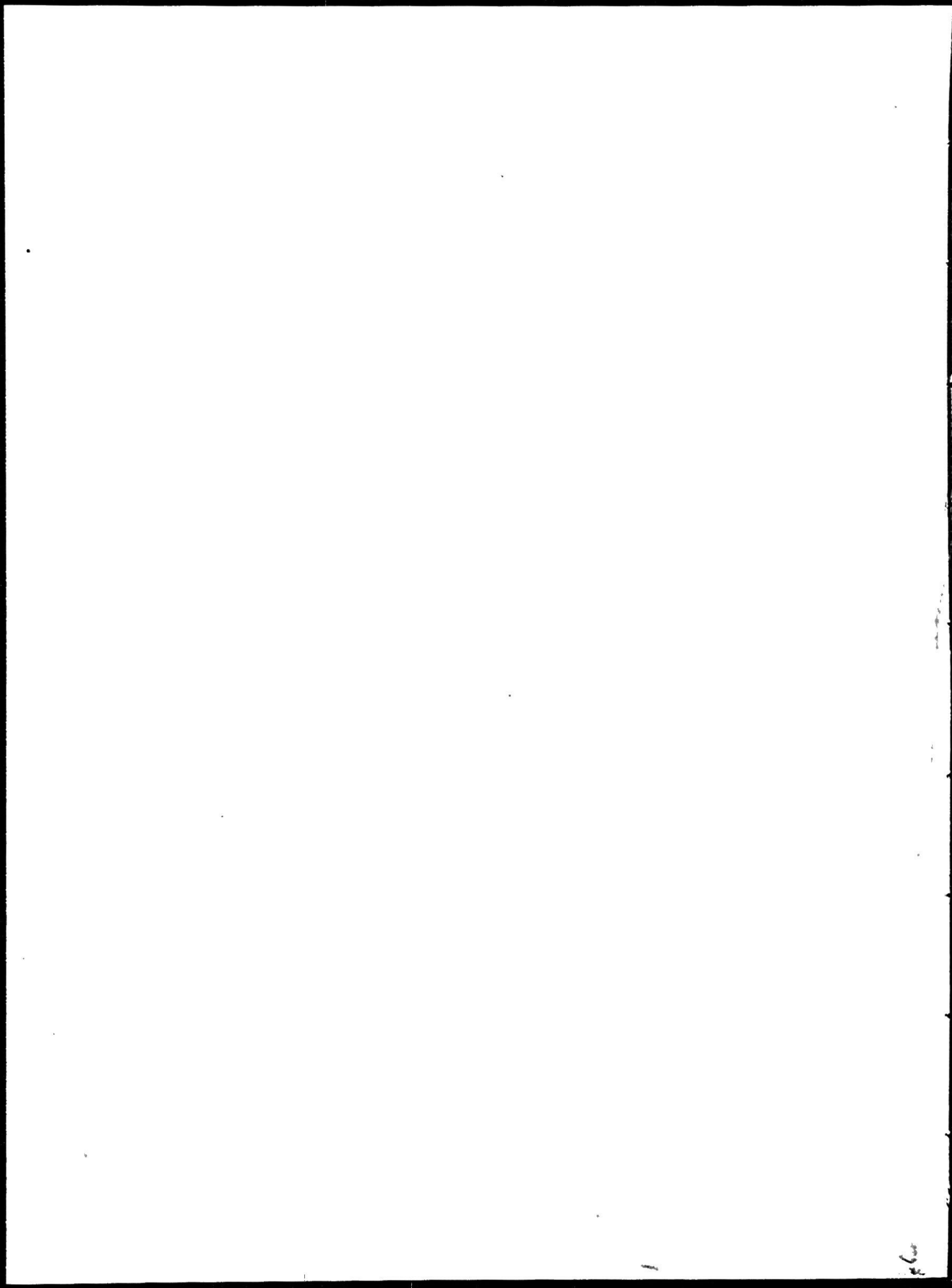
Attorney for Petitioner

QUESTION PRESENTED

By stipulation of all parties, approved by the Court and filed, the question presented in this case is as follows:

To determine whether the Federal Communications Commission was arbitrary and capricious, and violated Sections 303(f), 303(r), and 307 (b) of the Communications Act of 1934, as amended, Sections 4(d) and 6(d) of the Administrative Procedure Act, and Commission Rules 1.701, 1.702, and 1.729, by denying petitioner's request for the institution of a rule making proceeding to determine whether the table of television channel assignments in Commission Rule 3.606(b) should be amended so as to delete television channel 3 from Philadelphia, Pennsylvania, and to add channel 3 to Atlantic City, New Jersey.*

* None of the parties hereto concedes the correctness of any factual or legal premises implicit in this formulation of the issue.



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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,239

DAVID E. MACKEY,
Petitioner,

v.

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,
NATIONAL BROADCASTING COMPANY, INC.,
Intervenor.

PETITION TO REVIEW ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This case involves a petition for review of a Memorandum Opinion and Order of the Federal Communications Commission (hereinafter "Commission") (R. 25-27), released September 30, 1957, denying petitioner's request (R. 2-11) that the Commission institute a rule making proceeding to amend its table of television channel assignments in its Rule 3.606(b) so as to delete television channel 3 from Philadelphia,

Pennsylvania, and to add television channel 3 to Atlantic City, New Jersey. The request was filed with the Commission pursuant to Sections 303(f) and 303(r) of the Communications Act of 1934, as amended, Rules 1.701 and 1.702, and Section 4(d) of the Administrative Procedure Act.

The Petition for Review was filed in this Court on November 29, 1957, pursuant to Section 402(a) of the Communications Act of 1934, (47 U.S.C. Sec. 402(a)), as amended, and Section 10 of the Administrative Procedure Act (5 U.S.C. 1009).

STATEMENT OF THE CASE

On February 27, 1957, Mackey filed a petition with the Commission requesting that a rule making proceeding be instituted to amend the table of assignments of television channels contained in Rule 3.606(b) to delete channel 3 from Philadelphia, Pennsylvania, and to add channel 3 to Atlantic City, New Jersey. (R. 2-11) The petition was based on the allegations of fact and law summarized below.

The State of New Jersey has no television stations except Station WATV, Newark, which is nominally a New Jersey station but, in reality, is a New York station. Station WATV is located in the New York City Metropolitan Area, its sales office is located in New York City, and the Station is regarded as a New York Station by the broadcasting industry.* (R. 2-3)

The lack of television stations in New Jersey is the proximate result of the allocation of television channels in the Commission's Table of Assignments in Rule 3.606(b). (R. 3-4)

(a) The Commission adopted Rule 3.606(b) in 1952 and thereby assigned 14 UHF television channels (and one VHF channel, used by Station WATV) to New Jersey, a State blanketed many years before 1952 with VHF television signals from stations located in adjoining States -

* The transmitter is on top of the Empire State Building.

primarily, stations in New York, New York, and Philadelphia, Pennsylvania. (R. 4) In its 1952 "Sixth Report and Order" adopting Rule 3.606(b), the Commission rejected requests for the assignment of additional VHF channels to New Jersey, and pessimistic predictions for television broadcasting in the State if VHF channels were not added, by stating in effect that UHF channels would be utilized effectively in New Jersey. (R. 3-4, 6-7). Recent "deintermixture" proceedings make it clear that the Commission now recognizes that UHF has not been satisfactorily utilized in areas served by VHF stations established before, or contemporaneously with, UHF stations and assignments. (R. 4)

(b) The State of New Jersey does not lack television stations because there have been no potential broadcasters. Two UHF stations were constructed and operated in the State but ceased operations because of economic losses and competitive hopelessness. Two UHF construction permits for stations in the State have been relinquished, and three construction permits (including petitioner's) are outstanding. (R. 3)

In contrast to the allocation of 1 VHF and 14 UHF channels to the State of New Jersey, the neighboring State of New York has allocated to it 19 VHF and 47 UHF channels, while the neighboring State of Pennsylvania has allocated to it 11 VHF channels and 48 UHF channels. New York has 18 VHF stations (including two stations sharing time, but not including WATV), and 6 UHF stations (including one satellite station) in operation. Pennsylvania has 9 VHF stations and 15 UHF stations in operation. (R. 3)

There is no reasonable basis for the severe disproportion in the allocation of VHF channels among the States of New Jersey, New York, and Pennsylvania. According to the 1950 U.S. Census, New York ranked Number 1 among the States in population with 14,830,192 people; Pennsylvania ranked Number 3 with a population of 10,498,012; and New Jersey ranked Number 8 with a population of 4,835,329. Thus, the population of the State of New Jersey is approximately one-half the

population of the State of Pennsylvania, and approximately one-third the population of the State of New York. In area, New Jersey has 7,836 square miles, Pennsylvania has 45,333 square miles, and New York has 49,576 square miles. Thus, New Jersey is approximately one-sixth the size of Pennsylvania, and is between one-sixth and one-seventh the size of New York. (R. 4)

Rule 3.606(b) is contrary to Section 307 (b) of the Communications Act of 1934, which requires fair, efficient, and equitable distribution of broadcasting facilities among the several states and communities, to the extent that it assigns only one VHF television channel to New Jersey (at Newark). (R. 5-7)

(a) The standard of Section 307 (b) governs the Table of Assignments in Rule 3.606(b), as the Commission expressly recognized in adopting the Rule in 1952. (R. 5)

(b) The State of New Jersey was assigned a disproportionately small number of VHF television channels by Rule 3.606(b) in comparison with other states. (R. 4)

(1) The Commission in 1952 held that the disproportionately small number of VHF channels for New Jersey was compatible with Section 307 (b) of the Communications Act because UHF could compete and exist successfully with VHF in such areas as New Jersey. (R. 3-4, 6-7)

(2) Regardless of the validity or invalidity of the Commission's original judgment that UHF would succeed in New Jersey, the experience of the last five years has proved in fact that New Jersey has no television stations because of the present distribution of television channels to the State in Rule 3.606(b). Therefore, Rule 3.606(b) as it stands on the books today is contrary to Section 307 (b) of the Communications Act: it does not distribute television channels fairly and equitably among the several states because New Jersey does not have assigned to it more than the one VHF channel (which is, practically, a New York channel). (R. 5-6, 7)

In conclusion, the Mackey petition made a technical showing that VHF Channel 3 could be assigned under the Commission's Rules to Atlantic City, New Jersey, if it were deleted from Philadelphia, Pennsylvania, and would bring Rule 3.606(b) towards compliance with Section 307 (b) of the Communications Act of 1934. (R. 10)

The Commission denied Mackey's petition and refused to institute rule making proceedings to determine whether Channel 3 should be moved from Philadelphia, Pennsylvania, to Atlantic City, New Jersey, because

"* * * we do not believe * * * we would be justified in removing a television channel from a city of the size and importance of Philadelphia, where it is *** necessary to the maintenance of a healthy and effective competitive situation among the stations and networks in that market in order to provide a local outlet in Atlantic City * * * particularly when * * * there is no other VHF station in the Atlantic City area with which a Channel 3 station could compete on an equal basis * * *." (R. 27)

On March 11, 1957, the National Broadcasting Company, Inc., the present licensee on channel 3 at Philadelphia and Intervenor herein, filed an opposition (R. 12-19) to the above-described petition of Mackey, alleging that (1) Philadelphia is bigger than Atlantic City; (2) the Philadelphia station on channel 3 has been operating since 1941 and broadcasts NBC network programs; (3) the Commission rejected in 1952, in the "Sixth Report and Order", the contention that Section 307 (b) of the Communications Act requires VHF and UHF channels to be allocated separately; (4) the Commission's rule making power has been judicially held to extend to allocating television channels geographically; (5) the recent "deintermixture" proceedings "connotes" the removal of all or substantially all VHF channels from "an area"; and (6) even if Mackey's position were sound, Philadelphia would be unfairly treated if it were deprived of one of its VHF channels, and there might be better places than Atlantic City within New Jersey to which channel 3 could be allocated.

On March 18, 1957, Mackey replied to the said opposition, alleging it to be generally irrelevant to the arguments of petitioner. (R. 21)

STATUTES AND REGULATIONS INVOLVED

The Statutes involved in this appeal are the Communications Act of 1934, as amended, and the Administrative Procedure Act. The Regulations involved are those of the Federal Communications Commission. The pertinent provisions thereof are printed in the Supplement hereto.

STATEMENT OF POINTS

I. The Commission arbitrarily disregarded Sections 303 (f) and 303 (r) of the Communications Act by failing to institute a rule making proceeding in the face of petitioner's prima facie showing that Rule 3.606 (b) is contrary to Section 307 (b) of the Communications Act with respect to the assignment of VHF television channels to the State of New Jersey, and that the change of rule proposed would comply with, and effectuate, Section 307 (b).

II. The Commission arbitrarily denied petitioner the right to petition for issuance, amendment, or repeal of a rule, and to have a written denial of a request for rule making stating the grounds thereof, as provided in Sections 4 (d) and 6 (d) of the Administrative Procedure Act and Commission Rules 1.701, 1.702, and 1.729, as follows:

(A) The Commission failed to rule on petitioner's allegation that the present Rule 3.606 (b) violates Section 307 (b) of the Communications Act, with regard to the allocation of television channels to the State of New Jersey.

(B) The Commission based its denial of rule making on purported facts not of record and beyond the Commission's "expertise" with respect to television station and network competition and its meaning and significance in Philadelphia and Atlantic City.

(C) The Commission denied petitioner's request for rule making as impractical, without factual or reasoned support for such conclusion.

(D) The Commission based its denial of rule making on the ground that the change of rule advocated by petitioner is not ideal and that the Commission might in several years discover a better change of Rule 3.606(b).

III. In denying the requested rule making, the Commission arbitrarily compared (adversely to petitioner) its avowed policy of stimulating competition in television broadcasting with the "scarcity" of VHF television channels in New Jersey, rather than with the violation of Section 307 (b) of the Communications Act resulting from the failure of the Commission to assign VHF channels to New Jersey. This specious reasoning process resulted from the failure of the Commission, stated above, to rule on petitioner's allegation that the allocation of television channels to the State of New Jersey in Rule 3.606(b) violates Section 307 (b) of the Act.

SUMMARY OF ARGUMENT

Petitioner has asked the Commission for a hearing - a rule making hearing, and has been denied its request. Consequently, petitioner now asks the Court to reverse and remand the subject order of the Commission for further and lawful consideration of petitioner's request for a hearing; petitioner is not asking the Court to review the substantive merit of the specific proposed change of Rule 3.606(b).

I

The Commission has the legal duty under Section 303 (f) and 303 (r) of the Communications Act to adopt and change its rules in order to carry out the provisions of the Act. Section 307 (b) of the Act requires that broadcasting facilities be distributed fairly, efficiently, and equitably among the several states and communities. This standard is expressly a basis for the table of television assignments (among the states and communities) contained in Rule 3.606(b).

The Commission recognized, when it adopted the table of assignments in 1952, that the allocation of only one VHF channel to New Jersey

complied with the standard of Section 307 (b) of the Communications Act only because the 14 UHF channels also assigned to the State "would work." The Commission's order to which objection is made in this case recognizes that UHF has not worked - at least in New Jersey. It follows that the present allocation of only one VHF channel to New Jersey (used essentially as a New York channel) is now contrary to the equitable distribution requirements of Section 307 (b) of the Communications Act - in view of the greater number of VHF assignments to neighboring states. It also follows that, if one VHF channel assignment for New Jersey is inadequate, the assignment of a second VHF channel to New Jersey must bring Rule 3.606(b) toward compliance with Section 307 (b) of the Act.

The Commission's subject order does not deny petitioner's allegation that the assignment of only one VHF channel to New Jersey is now contrary to Section 307 (b) of the Communications Act, nor does it deny that the assignment of a second VHF channel would bring Rule 3.606(b) toward compliance with Section 307 (b). The order in effect, merely expresses the desire that some other method of rectifying the error will be forthcoming in the indefinite future, and that such method will avoid any diminution of competition in Philadelphia on channel 3. This constitutes arbitrary action by the Commission which must be reversed.

II

Mackey's rights to petition for a change in Rule 3.606(b) and, in the case of a denial, to receive a written statement of the grounds for denial, are established by Sections 4(d) and 6(d) of the Administrative Procedure Act, and by Commission Rules 1.701, 1.702, and 1.729. These rights include the corollary right to reasonable, non-arbitrary, and responsive consideration of any petition for a change of rules and the same type of bona fide expression of reasons for denial. The Commission has not accorded petitioner such rights.

Thus, the order complained of neither agrees nor disagrees with

petitioner's basic contention that Rule 3.606(b) is presently contrary to the provisions of Section 307 (b) of the Communications Act.

Thus, the order complained of states without factual foundation the "importance of Philadelphia" as compared with Atlantic City, and finds that the continued use of channel 3 at Philadelphia by NBC is "necessary to the maintenance of a healthy and effective competitive situation among the stations and networks in that market * * *".

Thus, the order complained of finds that petitioner's proposed change in Rule 3.606(b) is not "practical", without explanation.

Thus, the order complained of assumes without reason that a better solution to the New Jersey allocation problem may be forthcoming in the indefinite future.

III

The Commission has, it says in the order complained of, a policy of promoting competition among television stations and networks. In reaching its ultimate decision on petitioner's request for the institution of a rule making hearing or proceeding, the Commission has compared the relative merits of applying its policy of promoting competition (in Philadelphia, on the basis of assumed facts) on the one hand, with the "scarcity" of VHF television channels in New Jersey, on the other hand. This is not responsive to petitioner's pleading to the Commission. It is necessary, for fair consideration under the law, that the Commission decide (1) the validity of petitioner's allegation that the allocation of channels to New Jersey in Rule 3.606(b) is contrary to Section 307 (b) of the Communications Act; and (2) if Section 307 (b) is violated, then, perhaps, the Commission might consider what to do in light of its policy of promoting competition in television broadcasting.

ARGUMENT

Petitioner emphasizes that all it is seeking from the Commission at this time is a hearing - a rule making hearing. Consequently, this honorable Court is not being asked to review the substantive merit of the specific change of rule proposed by petitioner, or to substitute its discretion for that of the Commission. The Court is being asked to determine that the Commission, for the reasons set forth below, has been arbitrary and unlawful in refusing to accord petitioner a rule making hearing.

I.

The Commission arbitrarily disregarded Sections 303(f) and 303(r) of the Communications Act in refusing to institute the rule making proceeding requested by petitioner.

Sections 303(r) and 303(f) of the Communications Act require that the Commission shall, as public convenience, interest, or necessity requires, adopt such rules as are necessary to carry out the provisions of the Act. One of the provisions of the Act is Section 307(b), requiring the Commission to distribute broadcasting facilities (including television channels) fairly, efficiently, and equitably among the several states and communities.

The Commission recognized when it adopted Rule 3.606(b) - the table of assignments of television channels among the states and communities - that the administrative standard of Section 307(b) must be adhered to in the substantive provisions of the table of assignments. Thus, paragraph 13 of the "Sixth Report and Order" of the Commission (1952) stated:

"13. The Communications Act of 1934, among other things establishes as a responsibility of the Commission the 'making available to all people of the United States, an efficient, nationwide, radio service,' (Section 1), and the effectuation of the

distribution of radio facilities in such a manner that the result is fair, efficient and equitable and otherwise in the public interest from the standpoint of the listening and viewing public of the United States (Sections 303 and 307b). Our conclusion that these standards can best be achieved by the adoption of a Table of Assignments is based upon three compelling considerations: * * *." (1 (Part 3) Pike and Fischer, Radio Regulation 91:604)

It is also clear that Section 307 (b) of the Act requires that the standard of equitable, efficient, and fair distribution of broadcast facilities applies to transmission facilities as well as to reception of broadcast service. Thus the Commission stated at paragraphs 78 and 79 of the "Sixth Report and Order":

"78. * * * The DuMont view is that emphasis should be placed on locating the assignments, particularly VHF channels, so that the largest number of people will have television service but not necessarily that the largest number of communities should have one or more television stations of their own. * * *

"79. The Commission, on the other hand, believes that on the basis of the Communications Act it must recognize the importance of making it possible with any table of assignments for a large number of communities to obtain television assignments of their own. In the Commission's view as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs. * * * " (Id. at 91:624. Emphasis supplied.)

As shown above in the Statement of the Case, the assignment of VHF channels to New Jersey is, and was in 1952, adversely disproportionate to that State in relation to the other States. How, then, could the Commission justify its allocation of channels to New Jersey in 1952? It rejected the plea for more VHF channels for New Jersey (and other locations) on the basis of a prediction of success for UHF

telecasting which has not materialized in New Jersey, as follows:

"195. In arguing that Section 307(b) of the Communications Act required the Commission to make separate and distinct assignments of VHF and UHF channels, * * * They contend that since there are admitted differences between VHF and UHF television facilities, as in the case of FM and AM, the holding in the Easton case must be construed as requiring the Commission to assign the VHF and UHF facilities independently.

* * * *

"197. Because television is in a stage of early development and the additional consideration that the limited number of VHF channels will prevent a nationwide competitive television service from developing wholly within the VHF band, we are convinced that the UHF band will be fully utilized and that UHF stations will eventually compete on a favorable basis with stations in the VHF. The UHF is not faced, as was FM, with a fully matured competing service. In many cases UHF will carry the complete burden of providing television service, while in other areas it will be essential for providing competitive service. In view of these circumstances, we are convinced that stations in the UHF band will constitute an integral part of a single, nationwide television service." (1 (Part 3) Pike and Fischer, Radio Regulation 91:664. Emphasis supplied.)

The Commission's order complained of herein implies that the table of assignments in Rule 3.606(b) is not in compliance with Section 307(b) of the Communications Act. (R. 25-27, especially paragraphs 5-7.) With respect to New Jersey, as shown in the Statement of the Case, it is clear that UHF channels have not become useful media of television broadcasting, leaving the State with but one useful (VHF) channel and that is allocated in such manner as to become a New York channel.

It is of secondary importance in this proceeding whether the Commission's adoption of Rule 3.606(b) was lawful or wise in 1952. It is extremely important, however, that the facts which have emerged from five years of experience under the table of assignments in Rule 3.606(b) demonstrate conclusively that the Rule as it stands on the books today is contrary to Section 307(b) of the Communications Act. It does not distribute television channels fairly and equitably among the several states because New Jersey does not have more than one VHF channel assigned to it. (Compare the number of VHF channels assigned to the neighboring states of New York and Pennsylvania.)

The Commission's order complained of does not controvert petitioner's allegations that Rule 3.606(b) does not comply with Section 307(b) of the Act, and that the assignment to New Jersey of a second VHF channel, as proposed by petitioner, would be a step toward rectifying the legal error. Nevertheless, the Commission has refused to accede to petitioner's request merely for a hearing on the subject for reasons which do not, in any sense, excuse the failure of the Commission to adhere to the law as expressed in Sections 303(f) and 303(2) of the Communications Act.

It is, perhaps, unnecessary to belabor the proposition that the Commission has a continuing legal obligation under the rule making provisions of the Communications Act to adopt and modify rules to effectuate the substantive provisions of the Act. However, the Court's attention is invited to the statement of the Supreme Court in National Broadcasting Co. v. United States, 319 U.S. 190, 225, involving the Commission's network rules:

"If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."

Along the same line, United States v. Storer Broadcasting Co., 351 U.S. 192, involving the Commission's multiple ownership rules, states at page 205 that a petitioner can initiate a change of rule by filing papers setting forth reasons, sufficient if true, to justify a change of the rules. As stated above, when petitioner's pleading to the Commission is considered as on demurrer — as it must be, in the absence of any denial of petitioner's allegation by the Commission — the petitioner must be afforded rule making which, prima facie, would carry out the requirements of Sections 303 (f), 303 (r) and 307 (b) of the Communications Act.

II

The Commission arbitrarily denied petitioner the right to petition for issuance, amendment, or repeal of a rule, and to have a written denial stating the grounds thereof, under Sections 4 (d) and 6 (d) of the Administrative Procedure Act and Commission Rules 1.701, 1.702, and 1.729.

The above-cited provisions of the Administrative Procedure Act and of the Commission's Rules form a scheme of procedure which confers upon any petitioner for rule making the right to fair, reasonable, and unarbitrary consideration of his request and, in the case of a denial, the same type of bona fide expression of reasons for denial. Arbitrary or non-responsive action by the Commission simply denies a petitioner of any meaningful rights under the Statutes and Rules. Mackey was not accorded his rights to proper consideration and disposition of his request for rule making in this proceeding, for the reasons stated below.

A.

The Commission did not rule on petitioner's allegation that the present Rule 3.606(b) violates Section 307(b) of the Communications Act, with regard to the allocation of television channels to the State of New Jersey.

The order complained of discusses the "scarcity" of "local television outlets" in New Jersey (R. 27); it discusses "serious television problems" (R. 26); but nowhere does the order conclude that the Commission agrees or disagrees with petitioner's main contention — that Section 3.606(b) is now contrary to Section 307(b) of the Communications Act. The order does recognize (R. 25) that petitioner alleged Section 3.606(b) to be contrary to Section 307(b), but there is no comment on the allegation. The failure of the Commission to consider the significance of petitioner's allegation of legal error amounts to a denial of petitioner's right of petition.

B.

The Commission's order is based on facts not of record and beyond the Commission's "expertise", with respect to television station and network competition and its significance in Philadelphia and Atlantic City.

Without a hearing, and without any quantitative factual evidence, the Commission concludes in the order complained of that the operation of a station on channel 3 in Philadelphia is necessary to maintain "healthy" (whatever that is) competition among stations and networks in the area, and that Philadelphia has a certain "importance" in comparison with Atlantic City. (R. 27) Low ebb is reached when the Commission relies on the fact that channel 3 should not be moved to Atlantic City because there is no other VHF channel in Atlantic City to provide competition (R. 27). [At the same time, the Commission points out that Atlantic City is served by four VHF stations from Philadelphia and Wilmington. (R. 27) Might not a hearing reveal that there would be

station and/or network competition between a channel 3 station at Atlantic City and the VHF stations received in Atlantic City from outside?] The facts assumed by the Commission to reach its conclusion are not on file or available to the Commission, nor is any source of facts indicated by the Commission.

C.

The Commission's order is based on an unsupported statement that petitioner's proposal is not practical.

According to the Commission (R. 27), petitioner's proposal is not "practical," but no reasons in support of this conclusion are advanced. If the word "practical" has here its ordinary meaning, petitioner has demonstrated the practicality of its proposal in an engineering affidavit filed in support of its proposal to the Commission. (R. 10-11)

D.

The Commission's order is based partly on the unwarranted assumption that a better solution of the New Jersey problem may be discovered in several years.

According to the Commission (R. 26-27), a better solution to the problem posed by petitioner may become available in a few years.

- (1) There is no basis in fact for the Commission's assumption.
- (2) The possibility of a different solution in the future to petitioner's problem does not excuse the Commission's present unlawful failure to make Rule 3.606(b) comply with Section 307(b) of the Communications Act.

III.

The Commission's order capriciously considers the Commission's policy of promoting competition between VHF stations with the "scarcity" of New Jersey VHF channels, rather than with the violation of Section 307 (b) resulting from the scarcity.

The Commission has, it says in the order complained of, a policy of promoting competition among television stations and networks. In reaching its ultimate decision on petitioner's request for the institution of a rule making hearing or proceeding, the Commission has considered the merits of its policy of promoting competition (in Philadelphia, on the basis of assumed facts), on the one hand, with the "scarcity" of VHF television channels in New Jersey, on the other hand. This is not responsive to petitioner's pleading to the Commission, nor is it a sound reasoning process.

As stated heretofore, petitioner is entitled to a ruling from the Commission on his contention that the allocation of television channels to New Jersey in Rule 3.606(b) is contrary to Section 307 (b) of the Act. If the Commission should agree with petitioner's contention, then there might be some point in giving consideration to the question of which principle should prevail - (1) the necessity for carrying out the requirement for equitable distribution of facilities under Section 307 (b) of the Communications Act, or (2) the Commission's policy (presumably under the general public interest standard of the Act) of promoting competition among television stations. The technique employed by the Commission of comparing its policy of promoting competition with mere "scarcity" of channels in New Jersey, per se, is merely a device for dodging ultimate consideration of the significance of the violation of Section 307 (b) inherent in Rule 3.606(b). Actually, petitioner believes that the express statutory mandate of Congress in Section 307 (b) must prevail over any policy pronouncement of the Commission.

CONCLUSION

For the foregoing reasons, petitioner prays that the Court enter its order reversing and setting aside the order of the Federal Communications Commission and remanding the case to the Commission for further proceedings consistent with law.

Respectfully submitted,

ARTHUR W. SCHARFELD

752 National Press Building
Washington 4, D. C.

Attorney for Petitioner

February 18, 1958

SUPPLEMENT

Statutes Involved

The statutes involved are the Communications Act of 1934 (47 U. S. C. Section 151 et seq; Act of June 19, 1934, c. 652, 48 Stat. 1064), as amended; and the Administrative Procedure Act (5 U. S. C. Section 1001 et seq; Act of June 11, 1946, c. 324, 60 Stat. 237).

Communications Act of 1934, as amended

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest or necessity requires, shall * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote the public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with; * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Sec. 307. (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Sec. 402. (a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

Administrative Procedure Act

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. * * * (d) Petitions. - Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Sec. 6. Except as otherwise provided in this Act. * * * (d) Denials. - Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. - (a) Right of Review. - Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action. - The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal pro-

ceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) **Reviewable Acts.** - Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) **Interim Relief.** - Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) **Scope of Review.** - So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of

procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Regulations Involved

The regulations involved are those of the Federal Communications Commission, 1 Pike and Fischer, Radio Regulation.

Rule 1.701. Suspension, amendment or waiver of rules. -

The rules and regulations of the Commission may be suspended, revoked, modified, amended, or supplemented, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act. Any provision of rules may be waived by the Commission, if good cause therefor exists.

Rule 1.702. Petition for amendment or waiver of rules. -

Any interested person may petition for issuance, amendment, repeal or waiver of any rule or regulation. Such petition shall show the text of the proposed rule, or its change, and set forth the reason in support of the petition.

Rule 1.729. Adverse rulings on petitions. - (a) Whenever the Commission denies in whole or in part any petition, prompt notice thereof will be given. This notice will contain or be accompanied by a statement of the reasons for the Commission's action unless it is merely an affirmance of a prior denial where reasons were given or the reasons for the denial are self-evident.

RETAKE

procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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BRIEF FOR RESPONDENTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,239

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED APR 15 1958

DAVID E. MACKEY, Petitioner

v.

Joseph W. Stewart
CLERK

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, Respondents

NATIONAL BROADCASTING COMPANY, INC., Intervenor

ON PETITION FOR REVIEW OF ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF THE QUESTION PRESENTED

The question in this case is whether or not the Federal Communications Commission was arbitrary and capricious and violated Sections 303(f), 303(r), and 307(b) of the Communications Act of 1934, as amended, Sections 4(d) and 6(d) of the Administrative Procedure Act, and Commission Rules 1.701, 1.702, and 1.729, by denying petitioner's request for the institution of a rule making proceeding to determine whether the Table of Television Channel Assignments and Commission Rule 3.606 should be amended so as to delete television Channel 3 from Philadelphia, Pennsylvania, and to add Channel 3 to Atlantic City, New Jersey. */

*/ Respondents do not object to Petitioner's Statement of the Question Presented. It is stated in Petitioner's Brief as stipulated to by the parties and is only repeated here for the Court's convenience.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,239

DAVID E. MACKEY, Petitioner

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, Respondents
NATIONAL BROADCASTING COMPANY, INC., Intervenor

ON PETITION FOR REVIEW OF ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

Since the Statement of the Case of petitioner, David E. Mackey, is inaccurate, incomplete and argumentative, respondents submit the following Counterstatement of the Case.

Petitioner is the permittee of Station WOCN(TV), a UHF station on Channel 52 at Atlantic City, New Jersey (R. 2). Intervenor, National Broadcasting Company, Inc. (NBC), is the licensee of Station WRCV-TV, a VHF station in Philadelphia, Pennsylvania, which operates on Channel 3 in that city and has been in existence since 1941 (R. 12). The case involves a petition for review of a Commission Order of September 30, 1957, denying the petition of Mackey for rule making proceedings to amend the Commission's Table of Assignments of

television channels as contained in Rule 3.606(b) of its Rules by deleting VHF television Channel 3 from Philadelphia, Pennsylvania, and adding it to Atlantic City, New Jersey (R. 25-27). Accordingly, this case brings before the Court another Commission action taken in connection with VHF television station allocations, a problem which has already been before the Court in various aspects in a number of other cases. 1/

As a result of certain proceedings begun in 1948, the Commission in 1952 allocated a number of UHF and VHF television channels throughout the country. Under this allocation, New Jersey was allotted 14 UHF and one VHF channel. See Sixth Report and Order, 1 Pike & Fischer (Part 3) 91:601 et seq. Two of these UHF channels were assigned to Atlantic City for commercial use -- more channels than were assigned to any other New Jersey city. Eleven VHF and 48 UHF assignments were granted to Pennsylvania, of which 3 VHF and 4 UHF channels (one of the latter of which was reserved for noncommercial educational use) were assigned to Philadelphia. On all three of these

1/ E.g., Peoples Broadcasting Company v. United States, 93 U.S. App. D.C. 342, 209 F. 2d 286 (1953); Logansport Broadcasting Company v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954); Coastal Bend Television Company v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F. 2d 686; Van Curler Broadcasting Corp. v. Federal Communications Commission, 98 U.S. App. D.C. 432, 236 F. 2d 727; Gerico Investment Company v. Federal Communications Commission, 99 U.S. App. D.C. 379, 240 F. 2d 410; Jacksonville Journal Company v. Federal Communications Commission, ___ U.S. App. D.C. ___, 246 F. 2d 699; WIRL Television Company v. United States, Cases Nos. 13,768, 13,769, 13,912, Decided March 27, 1958.

VHF channels, there were pre-existing stations which had been granted pursuant to the more limited VHF allocation in existence prior to the 1948 freeze. (See 10 Fed. Reg. 12267.) In addition, a VHF channel was assigned to Wilmington, Delaware (the only VHF channel and one of the only three commercial channels of any type assigned to Delaware). An existing pre-1948 station was also in operation on this channel. All of the other available VHF channels in the area were assigned either to New York City (six channels, all with pre-existing stations in operation), to Newark (New Jersey's largest city) (also a pre-existing station), or to Lancaster, Pennsylvania (again a pre-existing station). It was therefore impossible under controlling station mileage separations, then and now in force, to assign any other VHF station to New Jersey unless it was deleted from one of the cities in which a station was already on the air. Similarly, it was not possible to assign more than three VHF stations to Philadelphia, the fourth ranking city in the United States with a population of 2,072,000, even though the Commission expressly recognized "the size and importance of the City of Philadelphia and the need for the encouragement of economic competition." Sixth Report, 1 Pike & Fischer (Part 3), p. 91:729.

At the time of the Sixth Report and Order, the Commission, while recognizing that UHF would start off with an initial handicap in competition with VHF stations, believed that within a relatively short time UHF and VHF stations could compete effectively with one another. It accordingly did not attempt to make an independent

allocation of VHF and UHF channels throughout the United States but instead made an allocation in which both VHF and UHF channels were considered as a unit in providing a reasonable number of outlets to the several states and communities in conformity with the mandate of Section 307(b) of the Communications Act. See Sixth Report, 1 Pike & Fischer (Part 3), pp. 91:663-665. It did, however, give consideration to the recognized advantage of VHF channels for obtaining wide area coverage and "attempt to provide at least some VHF channels to all states though in some cases, an assignment might otherwise have been made to a large metropolitan center in an adjacent highly urbanized state." Sixth Report, 1 Pike & Fischer (Part 3), p. 91:622.^{2/} The authority of the Commission to refrain from making a separate VHF and UHF allocation, each complying in and of itself with the provisions of Section 307(b) of the Act was expressly affirmed by this Court in Peoples Broadcasting Company v. United States, 93 U.S. App. D.C. 342, 209 F. 2d 286, and Logansport Broadcasting Company v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24.

As this Court need not be reminded, UHF has not progressed as rapidly as the Commission had hoped. In many areas where both VHF and UHF stations were assigned or where service was in fact received

^{2/} Pursuant to this criterion the Commission refused to delete Delaware's only VHF channel from Wilmington to assign it to the much larger city of Philadelphia and New Jersey's only VHF channel from Newark to assign it to the New York metropolitan district. Sixth Report, 1 Pike & Fischer (Part 3), pp. 91:721, 91:727.

from VHF stations in nearby communities, UHF has found it difficult, if not impossible, to become established because of the preferences of audiences, networks and advertisers for the VHF facilities. In response to this problem, the Commission in November, 1955, initiated rule making proceedings to determine what changes, if any, in its over-all pattern of television allocation might be feasible in order to make possible the successful operation of a larger number of stations. Considered in this proceeding were such possible alternatives as the making available of new VHF channels, the use of directional antennas or lower power to "squeeze in" additional VHF stations, and a general reallocation of VHF and UHF channels to "deintermix" the channel assignments in individual communities so that some would be all VHF, others all UHF.

On June 26, 1956, after study of the many different proposals and the comments and data submitted to it, the Commission released its Report and Order in this over-all allocation proceeding (Docket No. 11532). See 21 Fed. Reg. 4958, 13 Pike & Fischer 1571.

In this Report and Order, the Commission rejected as unfeasible or otherwise not likely to be of any significant value all of the various proposals for a general change in the principles of allocation upon which the 1952 Table had been based save the one of a gradual shift to an all-UHF allocation. This proposal it did believe offered promise of leading eventually to an increased number of local outlets through the elimination of the VHF-UHF differentials

inhibiting the growth of the latter service. It recognized, however, that there were serious unresolved technical questions relating to the adequacy of UHF transmitting and receiving equipment. In combination with the differences in propagation characteristics between UHF and VHF channels, these problems made uncertain the feasibility of an all-UHF television service which would not deprive a substantial number of rural viewers or persons living in areas of rough terrain of their only opportunity for adequate service. The Commission therefore concluded it would be premature to institute formal rule making proceedings looking toward a change-over to an all-UHF plan until the Commission should have an opportunity of studying the results of intensive research into the matter by both Government and industry sources. And in furtherance of this objective, the Commission was instrumental in having established the Television Allocation Study Organization (TASO) which, since its organization, has been conducting important research and evaluation tasks looking toward an early final resolution of the feasibility of a move into an all-UHF allocation.

While the Commission, after a full rule making proceeding, thus decided, despite its recognition of real deficiencies, to adhere generally to its 1952 allocation pending its conclusion as to the feasibility of an all-UHF allocation, it did, at the same time, inaugurate a limited "interim" program of possible

spot reallocations. Its stated objective in this program for interim action was "to improve the opportunities for effective competition among a greater number of stations" in individual communities.

This, it believed, might be done either by "the elimination of VHF channel assignments to create improved opportunities for UHF broadcasting" or the assignment of "additional local VHF channels."

Recognizing that particular cases would have to be decided on their individual merits, the Commission nevertheless set out criteria for determining whether VHF channels assigned to a particular community should be deleted or additional channels assigned. These criteria were (13 Pike & Fischer R.R. 1582):

"In markets with one or more commercial VHF assignments, the merits of proposals to eliminate a VHF commercial assignment would depend to a large extent on such factors as:

1. Whether significant numbers of people would lack service as a result of the elimination of the VHF channel.
2. Whether one or more UHF stations are operating in the area.
3. Whether a reasonably high proportion of the sets in use can receive UHF signals.
4. Whether the terrain is reasonably favorable for UHF coverage.
5. Whether, taking into account all of the local circumstances, the elimination of a VHF channel would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations.

"The desirability of assigning a first VHF channel or of adding an additional VHF channel would depend principally upon:

- "1. Whether it is possible to locate the new transmitter so as to meet minimum transmitter spacings.
2. Whether, in cases where it is necessary to move the channel from another city, there is greater need for the channel in the area to which it is proposed to be assigned.
3. Whether the addition of a new VHF assignment would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations."

In its Report, the Commission expressed its awareness of the special problems of both VHF and UHF stations located in smaller communities neighboring the larger metropolitan areas where the overlap of service areas "tends to diminish the opportunities for the building and successful operation of a larger number of local stations." In part because of these problems, it rejected a proposed increase of maximum power for stations in Zone I (the Northeastern area of the country) which had been contemplated in a 1955 Report and Order (20 Fed. Reg. 5457). It also rejected a proposal to abandon the fixed Table of Assignments in favor of a case-by-case approach based upon individual applications, because of the delays which might occur where applications proposed conflicting assignments, and because retention of the present system of fixed assignments subject to rule making modification "is desirable for implementation of the policies adopted in this Report and Order." (See 13 Pike & Fischer R.R. 1587.)

At the same time, the Commission, on its own motion, issued Notices of Proposed Rule Making in thirteen representative

communities looking toward the addition or elimination of certain commercial VHF channels where it believed that such actions would be consistent with its interim program. By March 1, 1957, most of these rule making proceedings had been decided on the basis of the announced criteria set out above. A number of VHF and UHF channels have been moved and reassigned in some of the communities concerned. ^{3/} In others, the proposed changes were rejected as inconsistent with the public interest on evaluation of the facts in the light of the governing criteria. (See 22 F.C.C. 293-405.) The Commission made clear in its Report that it would consider petitions for additional amendments to the Table of Assignments. Thus, in a number of cases it has instituted new proceedings ^{4/} and in others it has denied the petitions at the threshold as not sufficiently showing promise of action in the public interest and not being consistent with the criteria it enunciated in its June 26, 1956 Report. ^{5/}

^{3/} In several cases (Evansville, Fresno) where channel shifts were decided upon involving existing permittees, the action was necessarily made subject to show cause hearings required by Section 316 of the Act.

^{4/} See, e.g., Columbus, Georgia, Docket No. 12054, 22 F.R. 4365; Walla Walla, Washington, Docket No. 12268, 22 F.R. 10226; Harrisburg, Illinois, Docket No. 12011, 22 F.R. 3230; Erie, Pennsylvania, Docket No. 12016, 22 F.R. 4757.

^{5/} See, e.g., Clearfield, Pennsylvania, FCC 57-510, May 20, 1957; Raleigh, North Carolina, FCC 57-512, May 20, 1957; Knoxville, Tennessee-Spartanburg, South Carolina, FCC 57-511, May 20, 1957; Charlotte, North Carolina, FCC 57-541, May 28, 1957; Fort Smith-Fayetteville, Arkansas, FCC 57-604, June 10, 1957; Jacksonville, Florida, FCC 57-1252, November 15, 1957.

On February 27, 1957, petitioner, David E. Mackey, a permittee of UHF station WOCN(TV) on Channel 52 in Atlantic City, New Jersey, filed with the Commission a petition requesting rule making to amend the Table of Assignments contained in Section 3.606(b) of the Rules and Regulations of the Commission to shift Channel 3, Philadelphia, Pennsylvania, to Atlantic City, New Jersey. In his petition, Mackey stated that there were no television stations in New Jersey except Station WATV on Channel 13 at Newark; that the lack of television facilities in New Jersey stemmed directly from the failure of the Commission to allocate to New Jersey its fair share of VHF channels and that deletion of VHF Channel 3 from Philadelphia and removal of that channel to Atlantic City, New Jersey would represent a step forward in correcting this existing inequity in New Jersey (R. 1-11).

No attempt was made to justify the choice of VHF Channel 3 in Philadelphia as the channel to be assigned to Atlantic City, except for an engineering statement indicating that such a switch would comply with the Commission's minimum separation rules (R. 10-11). ^{6/} No attempt was made to explain why Atlantic City rather than some other New Jersey community was the place to assign

^{6/} The engineering statement did not indicate that only Channel 3 in Philadelphia would meet these requirements or that use of this channel would in any way be more feasible than any other VHF channel.

a VHF channel if one was to be reallocated to that state, other than a bare statement it was feasible to do so and "is required in the public interest" (R. 6). No reference was made to the Commission's Report and Order of June 26, 1956, in Docket No. 11532 or the criteria for channel shifts therein outlined.

On March 11, 1957, National Broadcasting Company, Inc., licensee of Station WRCV-TV on Channel 3 in Philadelphia, filed an opposition to Mackey's petition. In its opposition, NBC pointed out that the proposed shift of Channel 3 from Philadelphia to Atlantic City involved the elimination of an established television station which had continuously served parts of New Jersey, Delaware, and Pennsylvania since 1947 and also involved the deletion of a television station from the fourth ranking market in the country in order of size to assign it to the 147th ranking market in the country. NBC also pointed out in its pleading that a substantial part of New Jersey lies within the metropolitan areas of Philadelphia and New York City and that since most of the State receives service from stations in New York and Philadelphia or both, more television service is probably available to New Jersey than to any other state (R. 12-19).

On March 18, 1957, petitioner Mackey filed a brief reply to NBC's opposition (R. 21-23). In the reply, petitioner stated that his petition for rule making was not predicated on the fact that Atlantic City was entitled per se to the Philadelphia channel;

that his petition did not attack the Commission's power to make television assignments by rule or the Table of Assignments in general; and that his position was simply that the State of New Jersey does not now have its fair share of VHF assignments.

Petitioner contended Philadelphia's needs for VHF services and its relative treatment in the allocation of VHF channels as contrasted with other smaller communities to which more VHF assignments had been made, was insignificant in the face of the lack of service in New Jersey. It also stated that "the possibility of allocating a VHF channel to some other New Jersey city other than Atlantic City is irrelevant here." It suggested, however, that the "demand" for stations in Atlantic City was evidenced by the fact that there were two outstanding (but inoperative) UHF grants, and another UHF station had operated for a while, but had suspended operation (R. 21-23).

On September 30, 1957, the Commission issued a Memorandum Opinion and Order denying the Mackey petition for rule making. The Commission pointed out that it was presently engaged in a long-range study to attempt to solve the lack of local television outlets in New Jersey and elsewhere; that this study and the implementation of any program based thereon would take a considerable amount of time; that, in the meantime, it was pursuing a policy of instituting rule making proceedings only where the proposals requesting channel changes appeared to provide greater opportunities for television growth and for effective competition among a greater number of

stations. The Commission stated, however, that deletion of Channel 3 from Philadelphia and moving it to Atlantic City as proposed by petitioner, would not conform to its interim allocation revision program. This, it indicated, was the case because the move would deprive one of the largest cities and metropolitan areas in the country of an established and competitively needed service. On the other hand, the Commission felt the proposed shift to Atlantic City did not present a practical remedy for alleviating the difficulties in providing local television service in an area which already receives multiple VHF services, and also would not create improved conditions for effective competition among a greater number of stations (R. 27).

Petitioner did not seek reconsideration of this action before the Commission. Instead, he filed the instant petition for review.

SUMMARY OF ARGUMENT

Contrary to petitioner, the issue on review is not procedural but substantive. The Commission has no obligation to set any rule making petition for hearing where it can determine upon examination of the pleadings that the proposal would not serve the public interest and sets forth the reasons therefor. Since this is exactly what the Commission did here, the only question properly presented to the Court is the reasonableness of the Commission's conclusions.

Petitioner's rule making proposal, on its merits, is defective in both theory and application. The Commission was under no

requirement to correct the alleged shortage of local television facilities in New Jersey through the deletion of a VHF channel from some other state and its reassignment to New Jersey. The Commission could properly find that the over-all public interest required that any such failure of its allocation plan to lead to an optimum distribution of operational television facilities among the several states be handled as part of its general proposal looking toward a possible all-UHF allocation, rather than by spot reassignments which would be inconsistent with its established interim policy of enhancing opportunities for effective competition in particular communities.

In any event, a need for VHF facilities in New Jersey, if assumed to exist, does not determine that such facilities should be assigned to the relatively small Atlantic City in lieu of one of the larger centers of population in the state, particularly since equitable distribution of facilities between communities as well as between states is specified in Section 307(b) upon which petitioner relies. Nor does either New Jersey's or Atlantic City's needs determine that Channel 3 in Philadelphia should be the one transferred under circumstances in which there is no showing or suggestion that other VHF channels could not also be used in New Jersey or Atlantic City. In short, petitioner's argument that the particular channel transfer he has requested must be consummated because it will comply with the Commission's technical requirements and there has been a request that it be made, is nothing more than a repetition of the

rejected demand that Section 307(b) allocations problems be settled on a case-by-case basis, and without consideration of the broader allocation picture. The entire line of television allocation cases in this Court since 1953 is incompatible with this view of the petitioner.

ARGUMENT

Introduction

Petitioner's basic argument in this case is a simple one. New Jersey, he urges, has not fared equitably in operational local television facilities under the 1952 Table of Assignments adopted by the Commission. It has only one VHF channel assigned under the Commission's Table of Assignments. Because of the inability of UHF generally to establish itself in competition with VHF stations (and in view of the geographic vise in which New Jersey finds itself between strong VHF stations in New York City and Philadelphia-Wilmington which provide multiple service to all or most of the state), its 14 UHF assignments lie dormant. Therefore, it is contended, the Table of Assignments, as of the present, violates the mandate of Section 307(b) to distribute frequencies and facilities fairly and equitably "among the several States ..."; New Jersey is entitled to immediate remedial action by the assignment of additional VHF channels, and, since one technically feasible way of accomplishing this objective would be the substitution of VHF Channel 3 in Atlantic City in lieu of Philadelphia, the Commission, upon request,

must institute rule making proceedings looking toward accomplishing this channel switch.

As will be immediately apparent, this argument constitutes a classic example of the tail attempting to wag the dog. As indicated in the Counterstatement, supra, petitioner, before the Commission made no real effort to justify his specific proposal -- the deletion of Channel 3 from Philadelphia and its assignment to Atlantic City. New Jersey, he urges, needs VHF channels for local expression. His proposal is one way of accomplishing this general objective. Ergo, it must be approved, or at least cannot be rejected without formal rule making proceedings. In line with this reasoning, all discussion of the relative needs of Atlantic City and Philadelphia, or of Atlantic City as against other New Jersey cities, or of Philadelphia against other possible sources of a VHF channel, or even of the choice of Channel 3 in Philadelphia as against the other VHF channels in Philadelphia, is dismissed as ipso facto irrelevant. The requested channel shift purportedly would further one facet of the licensing standard established by Section 307(b) -- the fair and equitable distribution of channels among the several states. It therefore must be accommodated despite its possible adverse impact upon the distribution of channels among the "several communities", and regardless of its effect upon other valid allocation principles in the public interest.

We submit that no matter how it is disguised, this argument resolves itself into little more than a renewed contention that

Section 307(b) problems must be handled upon a case-by-case demand basis. The argument having been expressly rejected by this Court in Peoples Broadcasting Co. v. United States, 93 U.S. App. D.C. 342, 309 F. 2d 286 (1953) and again in Logansport Broadcasting Co. v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954), is now brought forward in a slightly different dress. Petitioner now admits it must go through the forms of rule making. But, since it is also contended that the Commission has no real choice but to institute proceedings upon demand, the end result is virtually the same -- the over-all public interest must be ignored in favor of the specific demand. The Commission, thus, cannot consider whether New Jersey's admitted needs for an opportunity to develop its own television outlets cannot better be accomplished in a manner more compatible with the over-all public good than that advanced by petitioner. It must instead accept petitioner's solution because he has requested it do so, and the proposal is technically feasible.

We are, of course, aware of the fact that petitioner commences his argument in his brief by a plaintive statement that he is not seeking to have the Court review the merits of his requested rule change or to substitute its discretion for that of the Commission: "all it is seeking from the Commission at this time is a ... rule making hearing" (Br., p. 10). But, as we shall show below, petitioner has no right to a rule making hearing because he has asked for one. Only if this Court, upon consideration of the merits of petitioner's

specific rule making proposal, concludes the Commission arbitrarily or capriciously abused its discretion in refusing to institute formal rule making proceedings can the Commission's action be reversed. As we shall show, this clearly is not the case here.

I. THE COMMISSION COULD LAWFULLY DENY
WITHOUT FORMAL RULE MAKING PROCEEDINGS
PETITIONER'S REQUEST THEREFOR, PROVIDED
ONLY THAT IT SET FORTH ITS REASONS FOR
SO ACTING CLEARLY AND SUCCINCTLY

Section 4(d) of the Administrative Procedure Act (5 U.S.C. 1003(d)) provides that every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule. Section 1.702 of the Commission's Rules (47 C.F.R. 1.702), which is merely an implementation of Section 4(d) of the Administrative Procedure Act, similarly provides that any interested person may petition for a change in the Commission's Rules. Section 6(d) of the Administrative Procedure Act (5 U.S.C. 1005(d)) provides in pertinent part that if an agency denies an application for a change in its rules, it must, in so doing, state its reasons therefor. Section 1.729 of the Commission's Rules (47 C.F.R. 1.729), its equivalent, likewise provides that when the Commission denies an application for rule making, it must state its reasons therefor.

Petitioner was not entitled to rule making proceedings simply because he petitioned for them. There is nothing in the Communications Act, the Administrative Procedure Act, nor the Commission's Rules which indicates that the mere filing of a petition for amendment or

repeal of a rule requires the Commission to grant such a petition or to hold a hearing thereon, or to engage in any other public rule making proceedings in regard thereto. Sections 303(f) and (r) of the Communications Act, 47 U.S.C. §§ 303(f) and (r), upon which petitioner relies do not require that rule making be instituted upon demand, where the Commission finds for good and sufficient reasons that the public interest, convenience and necessity would not be served by such action. All that the Commission is required to do under law is to receive and consider such petitions for rule making proceedings. Nor does the fact that Section 1.702 of the Commission's Rules permits the filing of an application for rule making foreclose the Commission from denying any such application provided its action in doing so is not an abuse of discretion and provided further, that it states its reasons for denying such application and otherwise abides by the requirements of Rule 1.729 and Section 6(d) of the Administrative Procedure Act. See Sen. Rep. No. 752, S. 7, 79th Cong., 1st Sess., at page 15, and House Rep. No. 1980, S. 1, 79th Cong., 2nd Sess., at page 26. See also Potomac Broadcasting Corp. et al, 6 R.R. 559 (1950). Ergo, the only question to be determined in this case is whether the Commission's denial of Mackey's proposal for rule making proceedings without a hearing was in any way an abuse of its discretion, within the meaning of its own Rules or the relevant sections of the Administrative Procedure Act, supra.

II. THE COMMISSION'S DENIAL OF PETITIONER'S
APPLICATION FOR RULE MAKING ON ITS
MERITS WAS NOT AN ABUSE OF ITS DISCRETION

Petitioner's application for rule making below was specifically directed to amending the Table of Assignments contained in Section 3.606(b) of the Commission's Rules under which the State of New Jersey was allocated one VHF channel and 14 UHF channels, by shifting VHF television Channel 3 from Philadelphia, Pennsylvania to Atlantic City, New Jersey (R. 2-11). The proposed shift of the channel in question (VHF Channel 3, Philadelphia) was justified on a collateral argument to the effect that the State of New Jersey was not allocated its fair proportion of VHF television channels under the 1952 Table of Assignments as contained in Rule 3.606(b) and as required by Section 307(b) of the Act, and that the transfer of Channel 3, Philadelphia, would, to some extent, serve to remedy the existing inequity in New Jersey and so bring the 1952 Table of Assignments into closer conformity with the requirements of Section 307(b) of the Act. (R. 7).

In its Order of September 30, 1957, denying Mackey's application for rule making, the Commission, addressing itself to both the general allocation problem relating to the dearth of transmitting facilities in New Jersey and similar areas and to the specific proposal laid before it to modify Rule 3.606(b) by deleting VHF Channel 3 from Philadelphia and moving it to Atlantic City, stated as follows (R. 26-27):

"5. Last June, following an intensive study of the serious television problems which have arisen since the present television allocation plan was adopted in 1952 and after consideration of a vast number of proposals for solving these problems, the Commission released its Report and Order in Docket No. 11532, outlining a long-range program designed to improve the over-all television allocation structure and to achieve more fully the objectives of the Sixth Report and Order and the requirements of the Communications Act. Since as part of this long-range program, a thorough study of the possibilities of ultimately using the UHF band exclusively, or in a major portion of the United States, for television was planned and the study and implementation of such a program would necessarily take a number of years, the Commission also gave consideration to what action might be taken in the interim to improve opportunities for more effective competition among a greater number of stations. Accordingly, we have since that time pursued a policy of instituting rule making to consider proposals requesting channel changes in particular areas and communities which appear to provide greater opportunities for television growth and for effective competition among a greater number of stations in the interim, pending a completion of our long-range study.

"6. We have examined the subject proposal and the arguments of the parties with respect thereto, and we do not believe that it is one upon which the institution of rule making is warranted. Petitioner's proposal to obtain a VHF channel assignment for Atlantic City is dependent upon deleting Channel 3 from Philadelphia upon which a station is and has been operating for many years. Philadelphia, with a 1950 population of 2,071,605, and a metropolitan area population of 3,671,648, is the fourth largest market in the country and has been assigned three commercial VHF and four UHF channels, one of which is reserved for educational use.

"7. The scarcity of local television outlets in New Jersey and in other areas presents a problem which we are seeking to solve in our long-range program for improvement in the television allocation structure. However, we do not believe that at this time, when we are pursuing the objective of improving the competitive situation in as many communities and areas as possible so as to make more and better television available to

"the public we would be justified in removing a television channel from a city of the size and importance of Philadelphia, where it is meeting the public need for service and is necessary to the maintenance of a healthy and effective competitive situation among the stations and networks in that market in order to provide a local outlet in Atlantic City, which is much smaller in size (61,657 population) and in a smaller market (1950 metropolitan area population 132,399, the 129th ranking market), particularly when we consider that there is no other VHF station in the Atlantic City area with which a Channel 3 station could compete on an equal basis and that Atlantic City receives service from the three Philadelphia stations on Channels 3, 6 and 10 and from the Channel 12 station at Wilmington, Delaware. In our view, this proposal neither presents a practical remedy for alleviating the difficulties which have hindered the establishment of local television outlets in New Jersey and Atlantic City nor serves the public interest by creating improved opportunities for effective competition among a greater number of stations."

We believe the foregoing to be on its face a completely reasonable disposition of the merits of the specific proposal placed before the Commission by petitioner, fully in accord with the law and the Commission's present interim policies in regard to the deletion and reassignment of VHF and UHF channels under certain limited circumstances. Thus, in paragraph 5 of its Order, the Commission indicates that it is presently engaged in a long-range program to improve and possibly revamp the entire television allocation structure by making it all UHF and in the interim is confining itself to a policy of instituting rule making proceedings to effectuate channel changes only in areas where such shifts would provide greater opportunities for effective competition among a greater number of stations. In paragraph 6, the Commission points out that

Mackey's proposal to obtain a VHF channel for Atlantic City is completely dependent on deleting Channel 3 from Philadelphia, one of the largest cities in the country, where it has been operating for many years. In paragraph 7, the Commission, after noting the paucity of television outlets in the State of New Jersey, states that it is moving to solve the problem both in New Jersey and in other areas of the country in its long-range program looking toward an all-UHF allocation. It also states that the objectives of its interim program for improving competition between stations would not be served by deleting Channel 3 from Philadelphia, where it is meeting a public need and providing healthy and effective competition among the stations and networks, to move it to much smaller Atlantic City where there is no other VHF assignment, and where VHF service is already received from four stations. In view of these facts, the Commission concluded that the proposal neither presented a "practical" remedy for the problems of New Jersey or Atlantic City, nor improved opportunities for effective competition among a greater number of stations.

In other words, the Commission stated it had determined as a result of its comprehensive study in Docket No. 11532 that the best way of dealing with the problem of the shortage of operational local facilities in New Jersey without unduly disrupting existing service and operations was through a move of all television stations to the UHF, if further study proved this to be feasible. And, with respect

to the specific proposal to shift Channel 3 from Philadelphia to Atlantic City, the Commission indicated it was deficient under two of the three criteria for adding a VHF channel to a community set forth in the June 26, 1956 Report and Order (21 Fed. Reg. 5958, 13 Pike & Fischer R.R. 1571). There was a greater public need for the channel in Philadelphia (criterion 2) and the addition of the channel to Atlantic City would not improve the competitive situation there since it would be a first VHF channel for that community (criterion 3). The Commission also concluded that the move of the channel to Atlantic City had not been shown to be a practical remedy for the transmission problems of either New Jersey or Atlantic City, in view of the fact that Atlantic City already receives service from two other Philadelphia VHF stations, as well as one in Wilmington, Delaware.

Petitioner, throughout his brief (as in his pleading before the Commission), refrains from so much as adverting to the Commission's Report and Order of June 26, 1956 or the long- or short-range judgments made therein. In Point II-D of his brief (p. 16), however, he does appear to come to grips briefly with the problem of whether the Commission may defer changes in its allocation table pending comprehensive study of all facets of the matter. He states, without any real argument, that it cannot. We believe that petitioner's position in this respect is manifestly incorrect. The Commission view that the transmission problems of New Jersey and Atlantic City

(as well as similar areas throughout the country) may best be overcome by the proposed move to an all-UHF plan is based upon the extensive record in Docket 11532 and is not merely an "unwarranted assumption" as petitioner contends. But more important, petitioner's basic position that action seeking a better over-all solution of the local service problem cannot take precedence over immediate action on petitioner's particular proposal is completely unsupportable.

Logansport Broadcasting Co. v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24, decided in 1954 after the issuance of the Sixth Report; Coastal Bend Television Corp. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F. 2d 686, decided in 1956 after Commission rejection of the first round of deintermixture petitions, and WIRL Television Co. v. United States, Case Nos. 13768, 13769 and 13912, decided March 27, 1958 after the issuance of the Report on the general allocation proceedings in Docket 11532 and action under the Commission's interim reallocation program, all stand for the proposition that the Commission may, in its discretion, refrain from taking action with respect to individual assignments, in view of considerations as to the impact of such actions on the over-all allocation pattern. Thus, in Coastal Bend, *supra*, the Commission rejected deintermixture proposals which it admitted might help a number of operating UHF stations in particular communities on grounds that it did not believe that such actions could have any serious impact upon the general allocation problem and might be inconsistent with actions to be taken in the general allocation

proceeding in Docket 11532 then about to commence. This rule making determination by the Commission was affirmed by this Court, which, in addition, approved the determination of the Commission to continue to make VHF grants, which would allegedly jeopardize the UHF stations. The Court said (98 U.S. App. D.C. 251, 255, 234 F. 2d 686, 690):

But we think that the Commission's decision to adhere to the 1952 allocation for the time being as reflected in its refusal to institute a "freeze" on construction permits for VHF stations to prevent competition with existing UHF stations is well within its statutory authority; its decision was based on its finding that the VHF stations would bring additional television service to a significant number of people. True, there would be loss to the public if VHF competition should destroy existing UHF stations before the current rule-making proceeding decides the ultimate fate of UHF television. But whether one factor should outweigh the other is precisely the sort of question which Congress, by employing the broad language of Section 303, wished to commit to the discretion of an expert administrative agency, not the courts. It is for the Commission, not the courts, to pass on the wisdom of the channel allocation scheme. National Broadcasting Co. v. United States, 319 U.S. 190, 224-25 (1943). So long as the Commission's action in such an area of discretion has a reasonable factual and legal basis, we may not overturn it. National Labor Relations Board v. Seven-Up Bottling Co., 334 U.S. 344 (1953); cf. Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947).

Similarly, in the recent WIRL case, supra, which involved a rule making proceeding instituted by the Commission on June 26, 1956 in conformity with its "interim" program of equalizing competitive opportunities, the Court, in affirming the deletion of the only VHF channel from Peoria, expressly affirmed as reasonable both the long-range and the interim programs of the Commission arrived

at in Docket 11532. ^{7/} Consequently, we think it stands as established law that the Commission is not required to approve a channel reassignment which might further achievement of part of the equitable allocation standard of Section 307(b) of the Act, where it reasonably concludes that other equally valid public interest considerations require disapproval. It is immaterial that such determination was made in deciding not to institute rule making proceedings rather than in deciding not to amend the rules after holding such a hearing.

Petitioner also objects to the Commission's conclusion in its Memorandum Opinion that its proposal does not present a practical remedy for alleviating the difficulties hindering the establishment of local television outlets in New Jersey and Atlantic City -- pointing out that it had demonstrated the move would conform to the Commission's technical standards (Br., p. 16). But this technical feasibility clearly is not what the Commission had in mind. Rather, it seems clear from the immediately previous reference to the fact that Atlantic City received service from three other VHF stations that it was talking about the problem of shadowing of smaller communities by stations in larger metropolitan areas, to which the Commission had adverted in its Report and Order of June 26, 1956.

^{7/} "The charge of arbitrariness is not well taken. The long-range goal of the Commission was to encourage UHF, and removal of potential VHF competition is a rational choice of means to achieve this end. The short-range or 'interim' goal was to improve the opportunities for effective competition among a greater number of stations." Slip Opinion, p. 7.

(See Counterstatement, p. 7, supra.) The Commission was all too aware from a number of cases with which it had had to deal ^{8/} that in such circumstances the assignment of even a VHF station in the smaller community will not insure its ability to compete since the network and national spot business will normally gravitate to the stations in the larger community. In fact, this is what petitioner itself had charged had proved to be the case with the VHF station assigned to Newark, New Jersey, a far larger community than Atlantic City (R. 5-7, Bx 4). Under these circumstances, the Commission properly concluded, in the absence of any contrary showing or attempt at showing by petitioner, that transfer of a VHF channel to Atlantic City would not be a practical solution for its problems or those of New Jersey.

But of course there is an even greater weakness in petitioner's case on its own terms. It is based solely on the need for a greater number of VHF stations in New Jersey; petitioner expressly stated he did not contend that "Atlantic City is per se entitled to a Philadelphia channel" or that Channel 3 had any special utility in Atlantic City than any of the other Philadelphia or Wilmington VHF channels ^{9/} -- instead it characterized all such consideration as irrelevant.

^{8/} See Fort Wayne-Angola, Indiana, 14 Pike & Fischer R.R. 1571, 21 Fed. Reg. 4058; Chattanooga, Tennessee-Rome, Georgia, 15 Pike & Fischer R.R. 1623, 22 Fed. Reg. 2360; Tulsa-Muskogee, Oklahoma, 15 Pike & Fischer R.R. 1720, 22 Fed. Reg. 6342.

^{9/} Commission calculations indicate that any of the four VHF channels presently assigned to Philadelphia or Wilmington would be technically usable in Atlantic City.

This disclaimer is not surprising since Atlantic City ranks tenth in the State of New Jersey in terms of population and is located in Atlantic County, which ranks twelfth in population in the 21 counties of New Jersey. ^{10/} Thus, if New Jersey has need for an immediate assignment of another of the scarce VHF channels, there is no reason to believe that a fair or equitable allocation of this channel would place it in Atlantic City. Nor does it answer the question to state that such an assignment will at least be "a step in the right direction" (R. 6). For assignment of a VHF channel to Atlantic City, which would give New Jersey two VHF assignments, would seriously impair, if not eliminate, the chances of one of the larger New Jersey communities of receiving such an assignment. Thus, if the immediate assignment of a VHF channel to New Jersey was required by the licensing standards of Section 307(b), there would be no reason to believe it should be made in Atlantic City.

Similarly, even if an immediate assignment of a VHF channel to New Jersey is required, there is no reason to believe it should be at the expense of Philadelphia. New York City has six commercial assignments; Philadelphia only three. If the Commission is required to assign a VHF channel to New Jersey, it might be better to do so

^{10/} The following nine cities in New Jersey have larger populations than Atlantic City: Newark, Jersey City, Paterson, Trenton, Camden, Elizabeth, East Orange, Bayonne, and Clifton.

The following eleven counties in New Jersey have larger populations than Atlantic County: Essex, Hudson, Bergen, Union, Passaic, Camden, Middlesex, Mercer, Monmouth, Morris and Burlington.

by deleting a channel from New York City than from Philadelphia. Certainly such a move would be more consistent with the Commission's interim program to improve competitive opportunities, since, even if the Wilmington station is counted in with the Philadelphia group, deletion of a channel there would leave a much more restricted competitive picture than removing a channel from New York.

We do not suggest that the proper way to handle the problem of New Jersey's lack of local stations posed by petitioner is by choosing among the New York and Pennsylvania VHF channels the one best suited for deletion and then determining the particular New Jersey community to which the channel should be assigned. Just such determinations would, of course, be required if petitioner were correct in his argument that any service unbalance must be immediately remedied. And there is no reason to believe that this process would result in picking Channel 3 in Philadelphia for assignment to Atlantic City. But as we have made clear, supra, we believe the proper conclusion was that reached by the Commission, that channel shifts to correct possible defects in the television allocation structure should be deferred pending consideration of the feasibility of a move to an all-UHF plan, except in these special cases where immediate opportunities for increased competition among stations in particular communities could be enhanced without depriving significant numbers of persons of their only adequate service.

The problem facing the Court here is, it must be recognized, essentially the same as that presented in the several deintermixture

cases. ^{11/} There the success of UHF operations was threatened by implementation of VHF assignments in the particular community in which the UHF station was located, whereas here, established VHF stations in nearby areas have effectively foreclosed any successful UHF operation in Atlantic City. ^{12/} But in both cases the reallocation proposed would have purportedly resulted in more service to the community involved, and in both cases the Commission rejected the proposed change because it jeopardized the general public interest in attempting to aid a particular community. Thus, this Court stated in Coastal Bend, supra, that "whether one factor should outweigh the other is precisely the sort of question which Congress, by employing the broad language of Section 303 wished to commit to the discretion of an expert administrative agency, not the courts". Particularly pertinent to the present situation, we believe, is the statement of the Commission in its Report and Order in the 1955 deintermixture proceeding (20 Fed. Reg. 8495, 13 Pike & Fischer R.R. 1511), cited with approval by this Court in Gerico Investment Co. v. Federal Communications Commission, 99 U. S. App. D. C. 379, 240 F. 2d 410. ^{13/} The Commission there

^{11/} See Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F. 2d 686; Gerico Investment Co. v. Federal Communications Commission, 99 U.S. App. D.C. 379, 240 F. 2d 410; Jacksonville Journal Co. v. Federal Communications Commission, ____ U. S. App. D.C. ____, 246 F. 2d 699.

^{12/} It cannot be suggested that except for the presence of VHF stations in nearby Philadelphia there was anything inherently deficient in UHF channels to serve the flat and relatively sparsely settled areas of southeastern New Jersey.

^{13/} In Gerico, it should be remembered, the situation was even closer to that presented here than in most of the other deintermixture cases, for there it was alleged that operation of VHF stations in Miami would deprive Fort Lauderdale of its only local outlet.

stated in language equally applicable here:

Premature involvement with questions relating exclusively to individual city assignments or limited areas, without reference to a nation-wide system, would unduly impede our progress in determining the basic course which it would be desirable to follow in considering possible revisions to the nation-wide allocation plan.

CONCLUSION

For the foregoing reasons, the Commission's Order of September 30, 1957, dismissing petitioner's application for rule making, should be affirmed.

Respectfully submitted,

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April 15, 1958

BRIEF FOR INTERVENOR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED APR 15 1958

No. 14, 239

DAVID E. MACKEY,

Joseph W. Stewart

CLERK

Petitioner,

v.

UNITED STATES OF AMERICA,

and

FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

NATIONAL BROADCASTING COMPANY, INC.,

Intervenor.

PETITION TO REVIEW ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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April 15, 1958

(i)

QUESTIONS PRESENTED

Whether petitioner has shown that he is entitled to judicial review of an order of the Federal Communications Commission denying his petition requesting the institution of a rule making proceeding? *

The following question is also presented, according to a stipulation of all parties:

To determine whether the Federal Communications Commission was arbitrary and capricious, and violated Sections 303(f), 303(r), and 307(b) of the Communications Act of 1934, as amended, Sections 4(d) and 6(d) of the Administrative Procedure Act, and Commission Rules 1.701, 1.702, and 1.729, by denying petitioner's request for the institution of a rule making proceeding to determine whether the table of television channel assignments in Commission Rule 3.606(b) should be amended so as to delete television channel 3 from Philadelphia, Pennsylvania, and to add channel 3 to Atlantic City, New Jersey. **

* This question was not stipulated by the parties. It became clear after petitioner's brief was filed that there was an absence of a showing of the requisite jurisdictional facts. Cf. United States v. Storer Broadcasting Co., 351 U.S. 192, 197 (1956).

** None of the parties hereto concedes the correctness of any factual or legal premises implicit in this formulation of the issue.

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UNITED STATES COURT OF APPEALS
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Intervenor.

**PETITION TO REVIEW ORDER OF THE
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BRIEF FOR INTERVENOR,
NATIONAL BROADCASTING COMPANY, INC.

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the facts in this case omits material facts and is argumentative and misleading. Accordingly, there is set forth below a counterstatement of facts.

National Broadcasting Company, Inc. ("NBC"), Intervenor, is the licensee of an existing very high frequency "VHF" television station, WRCV-TV, which operates on Channel 3 in Philadelphia, Pennsylvania. (R. 12).^{*} A commercial television station has been operated on that channel in Philadelphia since 1941. (R. 13) At the present time, WRCV-TV provides more than 125 hours a week of television service to approximately 6,321,494 persons who reside within the Grade B contour of the station. (R. 13)

THE NATURE OF THE CASE

This case arises on a petition to review a Memorandum Opinion and Order of the Federal Communications Commission ("Commission") which denied a request by petitioner to institute a rule making proceeding to amend the Commission's Rule 3.606(b). This Rule sets forth a Table of Assignments for television channels throughout the entire country. The rule making request here was for the express purpose of removing Channel 3 from Philadelphia and assigning it to Atlantic City, New Jersey. (R. 2).^{**}

A comparison of the relative sizes of these two cities shows:

	<u>Philadelphia</u>	<u>Atlantic City</u>
Market Rank	4th	129th
Population of City	2, 071, 605	61, 657
Metropolitan Area Population	3, 671, 048	132, 399

(R. 27)

^{*} In accordance with the prehearing stipulation, references are to the pages of the original record.

^{**} VHF television stations are not permitted to operate on the same channel in this part of the country unless separated by at least 170 miles (Rule 3.610). This distance was established to prevent mutually destructive interference between stations. It would be impossible to meet the minimum separation requirement in the case of Philadelphia and Atlantic City which are only 64 miles apart. Thus, this proposal is not a "drop in". If Channel 3 is in use at Philadelphia, it cannot be used simultaneously in Atlantic City. To use it in the latter city requires its elimination from Philadelphia.

Petitioner is the holder of one of two permits outstanding for UHF television stations in Atlantic City. Neither station is in operation. Television service is provided to Atlantic City at the present time by three stations in Philadelphia and one in Wilmington. (R.27)

New Jersey has been allotted one VHF channel and fourteen UHF channels under the Commission's present plan.

**THE COMMISSION'S TELEVISION ALLOCATION
RULE MAKING, 1945-1955**

Channel 3 had been in operation in Philadelphia for about four years when, in 1945, the Commission conducted a rule making proceeding which resulted in the adoption of rules and standards for television, including its first nationwide Table of Assignments. The 1945 Table assigned the thirteen then-existing VHF television channels to particular states and communities throughout the country and confirmed the continued assignment of Channel 3 to Philadelphia.

After most lengthy proceedings, the Commission, in April 1952, issued its so-called Sixth Report which, among other things, contained a revised nationwide Table of Allocations. 1 Pike & Fischer Radio Reg.* 91:599 (FCC 1952).

This 1952 Table contemplated the use of 12 VHF channels and 70 UHF channels. Under it, UHF and VHF channels, considered together, provided the unit which was allocated to provide a fair, equitable and efficient distribution of facilities as required by the Communications Act of 1934.** The Commission acknowledged that UHF channels and VHF channels were "marked by distinguishing characteristics", but nonetheless, it specifically rejected contentions that Section 307(b) of the Communications Act required it to treat VHF channels separately for purposes of drawing up the allocation plan. 1 R. R. 91:663.

* Hereinafter cited as "R. R. "

** 48 Stat. 1064, 47 U.S.C. Sections 151-609, as amended, hereinafter referred to as "the Communications Act. "

The Commission made detailed findings and conclusions about all areas of the country, including Pennsylvania, New Jersey and specifically referred to Philadelphia and Atlantic City. It concluded that Channel 3 should remain in Philadelphia. Id. at 91:729

The 1952 Table reflected the Commission's view that UHF was then sufficiently developed to be able to compete successfully with VHF, and, accordingly, many communities were "intermixed"; that is, allotted both UHF and VHF channels, so as to encourage the development of UHF television. As time has passed, UHF has not progressed as rapidly as had been hoped.

THE COMMISSION'S 1956 TELEVISION ALLOCATION PROGRAM

In recognition of this problem, in 1955 the Commission began proceedings to consider the feasibility of selective "deintermixture", i.e., making all channels in any given area either VHF or UHF, but not an intermixture of both. A report and order was issued in this proceeding on June 26, 1956 (herein called the "1956 Report"). Second Report on Deintermixture, 13 R.R. 1571 (FCC 1956)

Petitioner's brief omits any reference to this action.

In this 1956 Report, the Commission concluded that it would adopt a long range program which would "undertake a thorough, searching analysis of the possibilities for improving and expanding the nationwide television system through the exclusive use of the UHF band throughout or in a major portion of the United States." Id. at 1580.

The Commission stated it would consider the reassignment of television channels specified in the 1952 Table where either the addition of VHF assignments or the removal of existing VHF assignments would afford opportunity for the improvement and expansion of television service to the public in particular communities.

Petitioner's proposal seeks the elimination of one of three existing VHF stations in Philadelphia, and the addition of that particular VHF channel to Atlantic City.

In its 1956 Report, the Commission stated (13 R.R. 1582) that the addition of a VHF channel to a community would depend principally upon:

1. "Whether it is possible to locate the new transmitter so as to meet minimum transmitter spacings."

[The Commission here concluded that to provide Atlantic City with the channel, it must be removed from Philadelphia.]

2. "Whether, in cases where it is necessary to move the channel from another city, there is greater need for the channel in the area to which it is proposed to be assigned."

[The Commission, in the instant case, made a detailed comparison of the communities involved and concluded there was a greater public need for the continued operation of Channel 3 in Philadelphia than for the addition of the channel in Atlantic City.]

3. "Whether the addition of a new VHF assignment would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations."

[The Commission concluded that petitioner's proposal would furnish only a single VHF channel in Atlantic City and would not provide opportunities for effective competition among a greater number of stations.]

The Commission also stated in the 1956 Report (13 R.R. 1582) that the elimination of a VHF commercial assignment would depend among other things, upon:

1. "Whether significant numbers of people would lack service as the result of the elimination of the VHF channel."

[The Commission's comparison of the populations and markets of Atlantic City and Philadelphia in its Opinion and Order denying petitioner's request indicated that there would be a significant loss in service.]

2. "Whether one or more UHF stations are operating in the area."

[There are no commercial UHF stations operating in Philadelphia and only one educational UHF station.]

3. "Whether, taking into account all the local circumstances, the elimination of a VHF channel would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations."

[After detailed consideration, the Commission concluded that the continuance of Channel 3 in Philadelphia "was necessary to the maintenance of a healthy and effective competitive situation among the stations and networks in that market. . .!"]

THE COMMISSION'S REASONS FOR DENIAL OF THE RULE MAKING REQUEST

Petitioner's brief is rife with charges about what the Commission did not do. Because of this, it is important to set forth what the Commission did. In three final paragraphs of the Memorandum Opinion and Order complained of, the Commission set forth valid and convincing reasons dispositive of petitioner's rule making request. These read as follows:

"5. Last June, following an intensive study of the serious television problems which have arisen since the present television allocation plan was adopted in 1952 and after consideration of a vast number of proposals for solving these problems, the Commission released its Report and Order in Docket No. 11532, outlining a long-range program designed to improve the overall television allocation structure and to achieve more fully the objectives of the Sixth Report and Order and the requirements of the Communications Act. Since, as part of this long-range program, a thorough study of the possibilities of ultimately using the UHF band exclusively, or in a major portion of the United States, for television was planned and the study and implementation of such a program would necessarily take a number of years, the Commission also gave consideration to what action might be taken in the interim to improve opportunities for more effective competition among a greater number of stations. Accordingly, we have since that time pursued a policy of instituting rule making to consider proposals requesting channel changes in particular areas and communities which appear to provide greater opportunities for television growth and for effective competition among a greater number of stations in the interim, pending a completion of our long-range study.

"6. We have examined the subject proposal and the arguments of the parties with respect thereto, and we do not believe that it is one upon which the institution of rule making is warranted. Petitioner's proposal to obtain a VHF channel assignment for Atlantic City is dependent upon deleting Channel 3 from Philadelphia upon which a station is and has been operating for many years. Philadelphia, with a 1950 population of 2,071,605, and a metropolitan area population of 3,671,648, is the fourth largest market in the country and has been assigned three commercial VHF and four UHF channels, one of which is reserved for educational use. Stations are operating on the three VHF channels and on the UHF channel reserved for educational use.

"7. The scarcity of local television outlets in New Jersey and in other areas presents a problem which we are seeking to solve in our long-range program for improvement in the television allocation structure. However, we do not believe that at this time, when we are pursuing the objective of improving the competitive situation in as many communities and areas as possible so as to make more and better television available to the public, we would be justified in removing a television channel from a city of the size and importance of Philadelphia, where it is meeting the public

need for service and is necessary to the maintenance of a healthy and effective competitive situation among the stations and networks in that market in order to provide a local outlet in Atlantic City, which is much smaller in size (61,657 population) and in a smaller market (1950 metropolitan area population, 132,399, the 129th ranking market), particularly when we consider that there is no other VHF station in the Atlantic City area with which a Channel 3 station could compete on an equal basis and that Atlantic City receives service from the three Philadelphia stations on Channel 3, 6 and 10 and from the Channel 12 station at Wilmington, Delaware. In our view this proposal neither presents a practical remedy for alleviating the difficulties which have hindered the establishment of local television outlets in New Jersey and Atlantic City nor serves the public interest by creating improved opportunities for effective competition among a greater number of stations." (Emphasis supplied.)

SUMMARY OF ARGUMENT

I.

The Petition for Review should be dismissed for want of jurisdiction.

Petitioner has failed to show that he is a "party aggrieved by a final order" of the Commission as required by the Judicial Review Act of 1950 in that there is no showing that petitioner has sustained, or is immediately in danger of sustaining, a direct, substantial injury as the result of Commission action.

The order complained of is not a "final order" because it does not affect the property, business or contractual rights of petitioner; it does not compel him to do or refrain from doing anything; and it does not operate to control petitioner's business affairs.

Petitioner is not entitled to judicial review under Section 10 of the Administrative Procedure Act because the refusal of the Commission to grant a request to institute quasi-legislative proceedings is a matter of agency discretion and not reviewable.

II.

Assuming, arguendo, that petitioner is entitled to review, the petition should be denied because the Commission afforded petitioner full rights under all applicable statutes, regulations and decisions. The petition was entertained and given full consideration, and petitioner's specific proposal to move Channel 3 from Philadelphia to Atlantic City was denied on rational grounds that support the conclusion.

III.

Petitioner's proposal to move Channel 3 from Philadelphia to Atlantic City was rejected by the Commission on detailed and valid grounds and the denial of petitioner's request was neither arbitrary nor capricious. There is no necessity for this Court to reach the question as to whether the Commission's Rule 3.606(b), as supplemented by the existing policy embodied in the 1956 Report, is in accord with Section 307(b) of the Communications Act.

Even if the Court does undertake to pass on this question, it is settled law that Rule 3.606(b) represents a valid exercise of the Commission's discretion. Furthermore, similar actions by the Commission, implementing its long range and interim policies to strengthen the television allocation structure, have been upheld by this Court.

The manner and course of rule making policy to achieve statutory objectives are matters left to the discretion of the Commission and no abuse has been demonstrated. Petitioner cannot dictate or compel the Commission to implement statutory objectives in a particular way.

Finally, the Commission's exercise of its discretion is fully supported by the record and the Commission did not err in utilizing its experience and expertise or in considering facts "outside the record" in denying this rule making petition.

ARGUMENT

I.

PETITIONER HAS FAILED TO SHOW THAT HE IS ENTITLED TO JUDICIAL REVIEW AND THE PETITION SHOULD BE DISMISSED

The question of jurisdiction may be raised at any time. United States v. Storer Broadcasting Co., 351 U.S. 192, 197 (1956).

The Communications Act provides judicial review of the Commission's actions in two ways. First, under Section 402 (b), appeals may be taken to the United States Court of Appeals for the District of Columbia, if they complain of certain specified Commission actions, generally those relating to permits, licenses or other authorizations.

Secondly, all other appeals from orders of the Commission must, under the specific language of Section 402 (a) of the Communications Act, be brought as provided by and in the manner prescribed by the Judicial Review Act of 1950, 64 Stat. 1129, 5 U.S.C. Sections 1032-42, as amended. Section 4 of this Act permits appeals to any Court of Appeals of the United States, but only by parties "aggrieved by a final order" of the Commission. * 5 U.S.C. Section 1034.

The present Petition seeks review via the latter route. To invoke the jurisdiction of this Court, petitioner must affirmatively establish that (a) he has sustained or is in immediate danger of sustaining a direct injury as a result of the Commission's action (United States v. Storer Broadcasting Co., supra; cf. Greylock Broadcasting Co. v. United States, 97 App. D.C. 414, 231 F. 2d 748, 749 (D.C. Cir.), cert. denied, 352 U.S. 935 (1956) and (b) that the Commission's action complained of was a "final order" reviewable under Section 4 of the Judicial Review Act of 1950. Petitioner has not shown standing on either of these two essential jurisdictional requirements and, accordingly, his petition should be dismissed.

* The creation of two different avenues of review may have resulted from Congressional intent to differentiate between the Commission's legislative and its adjudicatory processes.

As to the first, the Petition For Review contains no allegation that petitioner is a "party aggrieved" nor any statement of facts from which injury to him, resulting from the Commission's order, may be fairly inferred. The only interest specified by petitioner is that he is a "permittee of Station WOCN (TV) (Channel 52) at Atlantic City, New Jersey", a UHF station. Petitioner claims no better standing than any other citizen of the United States. Petitioner has alleged no direct injury.

Petitioner's situation differs vastly from that of an existing UHF station which attempts to resist the invasion of a VHF authorization. In the latter situation, there is a direct injury because, as this Court has recognized, "The new allocation [of a VHF channel] poses in practical and realistic form a threat to the continuance of the UHF stations." Greylock Broadcasting Co. v. United States, supra, at 749. On the other hand, there is no direct injury because of such preliminary action as refusal to start proceedings to consider reallocating a particular channel. To extend appellate rights to every person who would be eligible to apply for the channel if allocated, would stretch the scope far beyond Congressional intent.

As Judge Major of the Seventh Circuit stated in his opinion for a unanimous court in Murphy v. United States, 16 R.R. 2043 (7th Cir., Feb. 17, 1958):

"To hold that every Tom, Dick and Harry can attack the Commission's order would be to render meaningless Section 402 (a) of Title 47 which limits the right of review to a 'person who is aggrieved or whose interests are adversely affected.' If petitioners have a right to attack the Commission's order as representatives of the public, all other subscribers of Bell would have the same right. Such a situation was obviously never intended by Congress and, if countenanced by the Courts, would result in intolerable delay and confusion." (P. 2047)

In addition, the Commission's order denying the rule making request was not a "final order" under the Judicial Review Act of 1950. Since it was merely a decision not to take the rule-making course which

petitioner urged, it did not amend or affect existing regulations. It did not compel petitioner to do anything or refrain from doing anything. It did not affect his existing contractual or property rights or business relationship. It did not operate to control the business affairs of petitioner. Compare Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942), F.C.C. v. American Broadcasting Co., 347 U.S. 284 (1954), and United States v. Storer Broadcasting Co., *supra*, holding that the rules and regulations of the Commission are "final orders" only when they control or affect existing rights or relationships of those to whom they apply.

In situations involving appeals under Section 402 (b) of the Communications Act, the Courts have paid special heed to the Congressional policy of limiting judicial review to complaints by truly aggrieved parties. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 309 U.S. 642 (1940). It is clear that, with respect to the quasi-legislative function of the Commission, Congress intended a more limited right to review so as to avoid unduly hindering or harassing the Commission in the performance of this function. Petitioner had the right to a rational decision by the Commission after reasonable opportunity to be heard. Absent a showing of actual injury or Constitutional wrong, petitioner has no absolute right to embroil the Commission in fruitless review proceedings more time-consuming and extensive in character than the original, limited proceeding before the Commission.

Petitioner states that he requests review pursuant to Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. Section 1009. Section 10 is applicable only to appeals under Section 402 (b) of the Communications Act and has no reference to Section 402 (a) under which petitioner claims, as he must, to appeal. Review under Section 402 (a) can only be sought through the Judicial Review Act by parties qualified thereunder. However, even assuming a petition for review will lie under Section 10 of the Administrative Procedure Act, petitioner is not entitled to such review here.

The Commission action was quasi-legislative. It refused to undertake a legislative-like inquiry as to whether its rules should be changed. This is the type of threshold determination committed exclusively to agency discretion.

In the Attorney General's Manual On The Administrative Procedure Act (1947), it is stated unequivocally, at page 39:

"Neither the denial of a petition under Section 4(d), nor an agency's refusal to hold public rule making proceedings thereon, is subject to judicial review. Sen. Rep. p. 44 (Sen. Doc. p. 230)."

The courts have recognized that actions of a legislative character which have been committed by statute to the discretion of an agency are not subject to judicial review. United States v. George S. Bush & Co., 310 U. S. 371, 380 (1940) (action of the President under the Tariff Act); Fahey v. O'Melveny & Myers, 200 F. 2d 420, 472-473 (9th Cir. 1952) (action of Federal Home Loan Bank Commissioner); Fleming v. Moberly Milk Products Co., 82 App. D. C. 16, 160 F. 2d 259, 272 (D. C. Cir.), cert. dism'd., 331 U. S. 786 (1947) (action of Office of Price Administration). It has also been repeatedly held that threshold determinations by an agency not to institute administrative proceedings are not judicially reviewable. Crooker v. SEC, 161 F. 2d 944, 949 (1st Cir. 1947) (refusal of the SEC to institute proceedings looking toward issuance of a "stop order"); General Drivers Local 886, AFL v. NLRB, 179 F. 2d 492, 494-495 (10th Cir. 1950) (refusal of the NLRB to certify a group for representation; refusal of NLRB general counsel to issue a complaint).

Section 303 of the Communications Act delegates to the Commission quasi-legislative powers to make regulations to carry out the broad purposes of the Communications Act, including authority to assign frequencies for individual stations as requested by petitioner. In this case the Commission decided not to institute proceedings of a quasi-legislative character. In so doing, it has taken precisely the type of action which has been held not to be judicially reviewable and the Petition for Review must therefore be dismissed for want of jurisdiction.

II. THE COMMISSION ACTED IN ACCORDANCE WITH EXISTING LAW IN DENYING THE SPECIFIC REQUEST OF PETITIONER TO MOVE CHANNEL 3 FROM PHILADELPHIA

No matter how embellished, petitioner presented to the Commission only one specific request to start a rule making proceeding:

Move Channel 3 from Philadelphia to Atlantic City.

The Commission entertained the petition. The Commission gave prompt notice when it denied the petition. It discussed at length the many reasons for its action. The mere allegation that action or a decision was "arbitrary and capricious", without substantiating factual assertions, is insufficient to support an appeal. Hunter v. McLaughlin, No. 14,090, D.C. Cir., Feb. 27, 1958.

THE COMMISSION OBSERVED ALL THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT AND ITS OWN RULES.

This case involves the right to petition the Commission and not the right to a hearing. Petitioner's claim to rights greater than the right to petition are patently unsound. To hold otherwise would grant to petitioner and all other citizens of the United States the power to circumvent and hamstring the Commission's discretion in determining how to devise rules, regulations, policies and remedies which it deems are best suited to further the public interest.

Specifically, petitioner argues that the Commission violated Section 4(d) of the Administrative Procedure Act, 60 Stat. 238, 5 U.S.C. Section 1003(d), and Rules 1.701 and 1.702 of the Commission's Rules of Practice and Procedure.* The Commission was confronted with a similar argument in Potomac Broadcasting Corp., 6 R.R. 559 (FCC 1950). Its conclusion in that case is dispositive of

* These Rules merely incorporate the substance of Section 4(d).

identical contentions here. It stated in part (at page 564):

"Under Sections 1.701 and 1.702 of the Commission's Rules of Practice and Procedure, and Sec. 4(d) of the Administrative Procedure Act, the filing of a petition for the issuance, amendment or repeal of a rule does not require us to grant it, or to hold a hearing, or to engage in any other public rule making proceedings. See Sen. Rep. No. 752, S. 7, 79th Cong., 1st Sess., at page 15, and House Rep. No. 1980, S. 1, 79th Cong., 2nd Sess., at page 26. While we are required to receive and consider petitions for rule making proceedings we are not compelled to undertake any rule making proceeding merely because such a petition is filed. The fact that our rules, quoted above, permit the acceptance of an application in conflict with the requirements of a specific rule or regulation when the application is accompanied by a petition to amend the applicable rule, does not alter the nature of the considerations governing disposal of the petition accompanying the application. It is a petition to amend or repeal the rules and as such is considered in the light of the principles applicable to such petitions. We are of the opinion therefore that the petitioner's contentions with respect to the right to be heard on its petition and other matters are without merit."

Certainly the Commission need not grant every rule making request and engage in lengthy, time-consuming and expensive proceedings to develop information it has already gathered and to reconsider contentions already rejected.

**SPECIFIC WRITTEN GROUNDS OF DENIAL WERE
FURNISHED PETITIONER**

Petitioner also alleges that he has been arbitrarily denied his right to have the written grounds for denial to which he is entitled under Section 6(d) of the Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. Section 1005(d), and Rule 1.729. This simply ignores the Commission's opinion. The opinion is replete with reasons why the Commission deemed it unnecessary and unwise to take the requested action.

1. It was pointed out that Atlantic City is the 129th market in the country with a metropolitan area population of 132,399 persons, whereas Philadelphia is the fourth largest market in the country with a 1950 metropolitan area population of 3,671,648 persons. The Commission concluded it would not be justified in removing a channel from a "city of the size and importance of Philadelphia, where it is meeting a public need for service" to provide a local outlet for Atlantic City.

2. In addition, the opinion observed that the continuance of Channel 3 in Philadelphia was "necessary to the maintenance of a healthy and effective competitive situation among the stations and networks in that market. . ."

3. The Commission observed that the 1956 Report outlined a long range program designed to improve the overall television allocation structure. In the interim, it noted, it intended to and has followed a policy of instituting rule making proceedings for revision of its channel allocation only where such channel changes appear to provide greater opportunity for television growth and for more effective competition among a greater number of stations. The Commission concluded that petitioner's proposal to assign a VHF channel to Atlantic City where no other VHF channel was located did not fall within the category warranting rule making.

4. The Commission pointed out that Atlantic City now receives service from 4 VHF stations.

These reasons were all directed to the specific proposal to move Channel 3 from Philadelphia to Atlantic City.

Section 6(d) of the Administrative Procedure Act and Rule 1.729 provide that prompt notice shall be given of a denial of a petition and that such notice will be accompanied by a simple statement of the grounds therefor. It is submitted that the Commission's opinion and order in the instant case more than met these requirements. Surely, petitioner was left in no doubt as to the Commission's reasons for denying his request.

As Judge Prettyman put it in Van Curler Broadcasting Corp. v. United States, 98 App. D.C. 432, 236 F. 2d 727 (D.C. Cir.), cert. denied, 352 U.S. 935 (1956):

"Since all procedural requirements as to rule making proceedings were met, no defect in the order appears in that respect. The conclusion reached by the Commission is clearly stated. The basis and purpose of the order are ample and understandably, even though succinctly, stated and are within the consideration prescribed by the statute as criteria for Commission action. . . . The given reasons are rational and support the conclusion. Having reached the foregoing conclusions the function of the Court is at an end in a case such as this." (pp. 729-30)

In Van Curler the Court agreed that the Commission could change its rule after appropriate proceedings. A fortiori, where, as here, the Commission adheres to existing rules and policies previously found lawful, after engaging in all requisite procedural preliminaries and arriving at rational conclusions, its order must be upheld.

THE COMMISSION'S ORDER IS A PROPER EXERCISE OF
ITS EXPERTISE AND IS SUPPORTED BY THE RECORD

Although petitioner is loath to state it directly, he obviously seeks a full-dress hearing on his rule making petition, notwithstanding that he clearly has no such right as a matter of statute, regulation or decision. Petitioner's brief (pp. 15-16) lists a series of related arguments aimed at accomplishing this purpose. He argues that the Commission's order was issued without a hearing and without "quantitative factual evidence", that unspecified "facts assumed" by the Commission are not available to it, and that the source of such facts is not indicated.*

* In the heading at this point in petitioner's brief, the contention is made that the Commission's order is beyond the Commission's "expertise". Apparently, petitioner did not think enough of this added argument to put anything in the text of its brief on the subject.

It should be noted that petitioner merely states these arguments in conclusionary fashion, without any attempt to specify what material facts were not in the record and without citation of any supporting authority. See Hunter v. McLaughlin, supra.

Actually, a review of the data submitted to the Commission in the proceeding on this petition for rule making readily shows that all material facts relied upon by the Commission were in the record. Most of them, such as the relative size and population of Philadelphia and Atlantic City, are set forth in NBC's opposition (R. 12-18). Moreover, petitioner's reply did not attempt to deny a single one of these facts.

Even if we assume arguendo that the Commission did not rely solely on the record before it in this proceeding, there would be no impropriety. The Commission may lawfully rely upon its expertise and the informed judgment and experience which it has acquired in all of its previous proceedings. FCC v. RCA Communications, Inc., 346 U.S. 86, 96 (1953); Storer Broadcasting Co. v. United States, 99 App. D.C. 369, 240 F. 2d 55 (D.C. Cir. 1956). Thus, even in an adjudicatory case the agency "is not confined to the record of a particular proceeding." See NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348-49 (1953).

A fortiori, the Commission is not so confined in making the preliminary, threshold decision of whether to institute quasi-legislative proceedings in the form of proposed rule making. Otherwise, its independence in matters of policy and in devising appropriate remedies could not be exercised. See Remote Control Operation of Certain Broadcast Stations, Pike & Fischer Ad. L. (2d ser.) (7 Ad. L. Dec. 638, 639-40) (FCC 1957); Attorney General's Manual On The Administrative Procedure Act, 31-32 (1947).

In sum, the Commission considered the request for rule making. It gave prompt notice of its denial. There was an accompanying statement of reasons for its action, which are both rational and understandable. On this basis alone, the action of the Commission should be affirmed.

III

THE COMMISSION'S ALLOCATION PLAN CONTAINED
IN RULE 3.606(b) AND ITS ALLOCATION POLICIES
ARE LAWFUL AND REQUIRED DENIAL OF THE RULE
MAKING REQUEST

The Commission met frontally and specifically the request made to move Channel 3 from Philadelphia to Atlantic City. It denied the request on valid grounds.

Petitioner insists, however, that the Commission's opinion is not responsive to a broadside attack made by him on the Commission's allocation plan of 1952.* As the Commission disposed of the specific request, there is no necessity for the Court to reach the larger question which petitioner seeks to raise here.

Even assuming that the question is reached, the Commission decision must be affirmed.

The theme of petitioner's argument is that VHF channels are better than UHF channels, that the Commission's expectation as to the utilization and development of UHF has not been realized, and that therefore the Commission must allocate VHF channels separately to comply with the requirements of Sections 303(f), 303(r) and 307(b) of the Communications Act.

The frame of reference chosen as background for this theme is three of the forty-eight states covered by the nationwide allocation plan in Rule 3.606(b). This setting -- New Jersey, New York and Pennsylvania -- purports to show, according to petitioner, that New Jersey has fared so poorly in the Commission's allocations that existing VHF channels must be switched from the adjoining states to satisfy the statutory requisite of fair and equitable distribution of facilities among the several

* It is to be noted that petitioner's request was specific and not general according to his pleading filed with the Commission which is denominated "Petition To Move Channel 3 From Philadelphia, Pennsylvania To Atlantic City, New Jersey."

states and communities.*

In short, in a new form here is the old argument, long since lost, that VHF channels alone must be the subject of a fair and equitable allocation.

To avoid the doctrine of stare decisis, the argument sets up a straw man. The fact is that there have been technical developments since 1952 and policies and plans developed by the Commission to meet the new situations. Petitioner has chosen to ignore all the later actions of the Commission which supplement its 1952 allocation plan, and does not even cite the 1956 Report. However, these plans and policies have been before this Court and have been upheld as lawful.

This Court on two occasions specifically upheld the 1952 Table of Assignments, which allocates VHF and UHF channels on an intermixed basis and as a unit and on the basis of communities as well as states. Peoples Broadcasting Co. v. United States, 93 App. D. C. 78, 209 F. 2d 286, 287 (D. C. Cir., 1953); Logansport Broadcasting Corp. v. United States, 93 App. D. C. 342, 210 F. 2d 24 (D. C. Cir., 1954).

In Logansport, the Court held:

"The fair interpretation of Sections 303 and 307(b), when read together, is that the Commission may allocate channels among communities either by passing upon specific applications or by way of rule making. Situations are not infrequent in which an administrative agency can properly proceed either through rule making or adjudication: in such a case, the choice 'is one that lies primarily in the informed discretion of the administrative agency.' Securities

* We need not dwell on petitioner's lack of logic except to note here that he contends that New Jersey has been mistreated, Pennsylvania has been given an overabundance and therefore a channel must be taken away from Philadelphia and assigned to Atlantic City. Of course, his conclusion is a non sequitur. It does not follow that Atlantic City is entitled to any additional channel, let alone this particular one. The solution might lie in an infinite variety of reallocations, none of which contemplates an addition to Atlantic City or an elimination in Philadelphia. Or it might lie in a new overall policy which would strengthen the whole allocation structure including New Jersey.

and Exchange Commission v. Chenery Corporation, 1947, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 1760, 91 L. Ed. 1995. After its experience in distributing FM radio frequencies pursuant to an allocation plan, and distributing AM frequencies in response to specific applications, the Commission has decided that by means of an allocation plan a more equitable distribution of television Channels can be effected. We do not think this was an abuse of discretion. We again sustain the Commission's present plan of allocation." (p. 27)

The argument is made here that the 1952 plan, which was upheld by this Court in 1954, is now illegal because UHF has not achieved the objectives originally anticipated.

This same contention was made in Coastal Bend Television Co. v. FCC, 98 App. D.C. 251, 234 F. 2d 686 (D.C. Cir. 1956), and the Court summarized the argument as follows:

"Petitioners' basic contention, presented in a number of forms, is that some of the hopes on which the Commission based its 1952 allocation, particularly as to set and antenna conversions and manufacture of all-channel receivers, have not been realized, and that therefore the 1952 allocation has now become contrary to the 'public convenience, interest, or necessity' and fails to 'encourage the larger and more effective use of radio in the public interest.' " (pp. 689-90)

In answer, the Court held:

"But we think that the Commission's decision to adhere to the 1952 allocation for the time being, . . . is well within its statutory authority. . . It is for the Commission, not the courts, to pass on the wisdom of the channel allocation scheme. . . So long as the Commission's action in such an area of discretion has a reasonable factual and legal basis, we may not overturn it." (p.690)

The Commission has not concluded that its 1952 plan is perfect forever and a day. The 1956 Report to which the Commission referred in its Memorandum Opinion and Order, indicates that steps are now being taken to strengthen the television allocation structure throughout

the whole country, including New Jersey. The long range plan contemplates more extensive use of UHF channels. The interim program is based upon the 1952 plan. Changes to shift VHF channels, as contemplated here, are considered (1) when there is a greater need in the area to which it is proposed to be assigned and (2) when the addition of the new VHF assignment would be consistent with the objectives of improving the opportunities for effective competition among a greater number of stations.

This Court has also had occasion to pass upon the legality of the present Commission approach to strengthen the television allocation through its long range and interim programs. In WIRL Television Co. v. United States, Nos. 13,768-69 and 13,912, D. C. Cir., March 27, 1958, a unanimous Court held:

"As we said in the Coastal Bend case, 'It is for the Commission, not the courts, to pass on the wisdom of a channel allocation scheme,' provided the decision has an adequate legal and factual basis and we find such a basis in the present case. The charge of arbitrariness is not well taken. The long range goal of the Commission was to encourage UHF, and removal of potential VHF competition is a rational choice of means to achieve this goal. The short range, or 'interim' goal, was to 'improve the opportunities for effective competition among a greater number of stations.' It was not arbitrary to conclude that the goal would be better approached in Peoria by allotting it four technically equal UHF channels, rather than one superior VHF channel and two inferior UHF channels. Appellant's only hope was to demonstrate in the rule making proceeding, that public interest required that channel 8 remain in Peoria, or that considerations of fairness to appellate overbalanced the public interest in removal of channel 8. Its views were presented in that proceeding, but were not adopted, and we can see no basis for saying the Commission's decision was beyond its authority, or that the underlying fact findings were not supported by substantial evidence, or that appellant was denied the procedural rights due a protesting party in a rule making proceeding."

So too here. Petitioner has been tilting at windmills. While vigorously contesting the legality of the 1952 allocation plan, it has failed to acknowledge that the plan has been supplemented by both a long range and an interim program. It has failed to establish that its proposal to add a VHF channel in Atlantic City falls within the objective sought by the interim program. Petitioner has chosen to ignore entirely the 1956 Report and its underlying programs. In one sense, this is merely an attempt to turn back the clock.

It has been demonstrated before the Commission that the proposal would be contrary to the public interest because it would deprive Philadelphia of an existing service for which there is a public need and of a channel which is necessary to the maintenance of a healthy and competitive situation among the stations and networks in that market.

In essence, petitioner in this case seeks to foist on the Commission an ad hoc approach of petitioner's own choosing, without regard for Commission policies enunciated in an effort to solve nationwide problems. This it clearly cannot dictate. The Commission and the Commission alone must determine the course of its own procedures.

Nothing is more essential to effective administration by an agency than control of its own processes. The question as to whether an agency shall proceed in a particular area by means of general rule making or on an ad hoc basis or by a combination of both is one which must be left to the determination of the agency. It is well settled law that the courts will leave such matters to agency discretion. SEC v. Chenery Corp., 332 U.S. 194, 203 (1947); Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 421 (1942); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953); Logansport Broadcasting Corp. v. United States, 93 App. D.C. 342, 210 F. 2d 24, 27 (D.C. Cir. 1954); Peoples Broadcasting Co. v. United States, 93 App. D.C. 78, 209 F. 2d 286, 287 (D.C. Cir. 1953); Pinellas Broadcasting Co. v. FCC, 97 App. D.C. 236 230 F. 2d 204, 206 (D.C. Cir.), cert. denied, 350 U.S. 1007 (1956).

Petitioner has an alternative, ad hoc proposal which is in conflict with current rules and policies. This warrants Commission consideration, but, in this case, petitioner's proposal has been given full consideration. He is not entitled to determine the course of rule making or to frustrate the program of the administrative agency.

CONCLUSION

Accordingly, for the foregoing reasons, the Petition for Review should be dismissed for lack of jurisdiction or, even if it is concluded that the Court does have jurisdiction, the Commission's denial of the rule making request should be affirmed as a proper agency action and the Petition for Review should be dismissed as groundless.

Respectfully submitted,

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April 15, 1958

APPENDIX A

Text of Statute Involved But Not Included
In Petitioner's Brief

Set forth below are the relevant parts of the Judicial Review Act of 1950, 64 Stat. 1129, 5 U.S.C. Secs. 1031-42, as amended, which are involved in this case but which are not included in petitioner's brief.

Section 2 (5 U.S.C. Section 1032).

"The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of Title 47, * * * .

"Such jurisdiction shall be invoked by the filing of a petition as provided in section 1034 of this title."

Section 4 (5 U.S.C. Section 1034).

"Any party aggrieved by a final order reviewable under this chapter may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 1033 of this title lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General."

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID E. MACKEY,	)	
Petitioner	)	
v.	)	Case No. 14239
UNITED STATES OF AMERICA	)	
and	)	
FEDERAL COMMUNICATIONS	)	
COMMISSION,	)	
Respondents	)	

MOTION BY NATIONAL BROADCASTING COMPANY, INC.
TO INTERVENE

National Broadcasting Company, Inc. (hereinafter "NBC"), by its attorneys, hereby moves this Court, pursuant to Section 402(a) of the Communications Act of 1934 (47 U. S. C. Sec. 402(a)), Section 8 of the Judicial Review Act of 1950 (5 U. S. C. Sec. 1038) and Rule 38 of the General Rules of this Court, for an Order permitting NBC to intervene in this case and to appear as a party herein, and for such other and further relief as may be just and equitable.

The nature of NBC's interest and the grounds upon which intervention is sought, are as follows:

1. As shown by the Memorandum Opinion and Order of the Federal Communications Commission (hereinafter "Commission") complained of in the Petition For Review, NBC is the licensee of television Station WRCV-TV on television Channel 3 in Philadelphia, Pennsylvania, and appeared in opposition to Petitioner's petition before the Commission requesting rule making to shift Channel 3 from Philadelphia to Atlantic City, New Jersey. The Commission's Memorandum Opinion and Order denied Petitioner's rule making petition.

2. If Petitioner were granted any part of the relief it seeks, namely, reversal of the Commission's action and a shift of Channel 3

from Philadelphia to Atlantic City, NBC would be aggrieved and its interests as the licensee and owner and operator of the television station on Channel 3 would be adversely, directly and substantially affected. Among other things, such a reversal would obviously and necessarily endanger NBC's investment in Station WRCV-TV, which amounts to millions of dollars, and would threaten great expense to NBC, as well as the disruption or destruction of its commercial television station, which provides more than 125 hours a week of television service to over 6,000,000 persons in the Philadelphia area. If Channel 3 were shifted away from Philadelphia, there would be no commercially feasible television channel available in the area over which NBC could be authorized to operate. In short, the rule making petition before the Commission and the Petition For Review are essentially a direct attack on NBC's television license and its property interests in Station WRCV-TV.

3. Due to the fact that NBC appeared as a party in interest to oppose the petition for rule making before the Commission, and the fact that NBC would be clearly and adversely affected by a reversal of the Commission's Memorandum Opinion and Order, NBC is entitled as of right to intervene and appear as a party herein under Section 402(a) of the Communications Act of 1934 (47 U.S.C. Sec. 402(a)) and Section 8 of the Judicial Review Act of 1950 (5 U.S.C. Sec. 1038), as well as under established principles of law and proper procedure.

Respectfully submitted,

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ACKNOWLEDGEMENT OF SERVICE

Each of the undersigned attorneys for the parties to the above case hereby separately acknowledges that on this 15th day of April, 1958 he was personally served with and physically received at his office copies of the foregoing Brief For Intervenor dated April 15, 1958.

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REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,239

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED APR 30 1958

DAVID E. MACKEY,

Petitioner,

v.

UNITED STATES OF AMERICA
and

FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

NATIONAL BROADCASTING COMPANY, INC.,

Intervenor.

PETITION TO REVIEW ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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UNITED STATES COURT OF APPEALS
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**PETITION TO REVIEW ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

REPLY BRIEF

INTRODUCTION

Petitioner and Respondents agree, apparently, that the Commission was required by law to consider and act on Petitioner's request for rule making to add Channel 3 to Atlantic City, New Jersey, and to delete Channel 3 from Philadelphia, Pennsylvania, in Rule 3.606(b), in a reasonable, non-arbitrary manner. (Respondents' Brief, pp. 19, 22) [It is presumed that the text of Respondents' Brief supersedes the substantially

different heading on page 18 of the Brief.] However, Petitioner and Respondents disagree, quite clearly, on the question of whether the Commission did dispose of Petitioner's rule making petition reasonably and properly.

The disagreement between the parties arises primarily from Respondents' insistence that any correction by the Commission of any maldistribution of VHF television channels must be accomplished within the limitations of certain policy announced by the Commission on June 26, 1956 and that, therefore, the Commission was not reasonably required under law to hold a rule making proceeding on Petitioner's reallocation petition. Petitioner, on the other hand, maintains that the present allocation of television channels to the State of New Jersey is contrary to Section 307(b) of the Communications Act, that the Commission's pronouncements of policy on June 26, 1956 cannot legally supersede rule making under Sections 303(r) and (f) of the Act to conform Commission Rule 3.606 to the requirements of the Act, including Section 307(b), and that, therefore, the rule making requested by Petitioner was arbitrarily denied by the Commission.

It is desirable, therefore, to examine the policy announcement of the Commission of June 26, 1956 and its legal significance for rule making. Other points of petitioner and respondents are discussed later.

I. PERTINENT HISTORY, CONTENTS, AND LEGAL SIGNIFICANCE OF COMMISSION'S REPORT AND ORDER OF JUNE 26, 1956.

On November 10, 1955, the Commission instituted a rule making proceeding (Docket No. 11532) to consider proposals to amend its Rules to overcome difficulties which had hindered expansion of the nation's television service since 1952. The proceeding culminated in a Report and Order of June 26, 1956, known popularly as the Commission's "Second Report on Deintermixture" [of UHF and VHF television channels]. (13 Pike & Fischer, Radio Regulation, 1571)

- A. The Report and Order did not adopt any long-range plan or program to solve the television problem; it expressed a hope or possible "goal" of all-UHF television broadcasting.

The Commission did not find, in this proceeding, the solution it had been seeking to the national television problem. It expressed the hope, and only a hope, that it might acquire in the indefinite future, from voluntary research by private individuals and organizations, sufficient factual information on certain aspects of UHF channel operation to determine

"whether the fullest possible exploitation of UHF's technical potentialities will enable UHF to render a service which will justify elimination of VHF broadcasting in a major part or throughout the United States." (Id., at 1579) (Emphasis supplied.)

True, the Commission invited interested parties to submit comments and data by October 1, 1956 on UHF broadcasting problems under the heading "FCC Inquiry Into the Feasibility of Transferring Television Broadcasting to the UHF Band." (Id., at 1580) However, any promise of an early solution to the national television problem through "all-UHF" broadcasting evaporated when the Commission, on October 4, 1956, ordered an indefinite extension of the time for filing comments, saying:

"However, in view of the far-reaching, long-range character of the changes that would be involved in a transfer of all or a major part of television to

the UHF and the time that would be required to make all of the necessary determinations as to its feasibility, it will be helpful if we continue to accept comments under this inquiry and, accordingly, no final date for the submission of such further comments is being designated at this time." (21 Fed. Reg. 7743)

B. The Commission adopted new criteria for assigning and reassigning television channels to promote effective competition among television stations.

After not finding a solution - long-range or otherwise - to the problem of inadequate expansion of television broadcasting in the United States, the Commission adopted in its Report and Order of June 26, 1956 a plan for "Interim Action." (Id., at 1581 et seq.) (While the term "interim" is illusory in the absence of any assurance that a long-range solution to the over-all television problem will be found, the term is of no importance so long as legal attributes are not attached to the word "interim".) The policy of the "interim" plan was announced as follows:

" * * * the Commission believes that steps should be taken in the meantime to improve the opportunities for effective competition among a greater number of stations." (Ibid.)

Improvement of competition was to be accomplished by "deintermixture" of UHF and VHF channels in some selected localities largely on the basis of certain enumerated factors, and the assignment of a first or additional VHF channels principally on the basis of certain other enumerated factors. (Id., at 1582) The latter read as follows:

- "1. Whether it is possible to locate the new transmitter so as to meet minimum transmitter spacings.
2. Whether, in cases where it is necessary to move the channel from another city, there is greater need for the channel in the area to which it is proposed to be assigned.
3. Whether the addition of a new VHF assignment would be consistent with the objective

of improving the opportunities for effective competition among a greater number of stations." (Ibid.)

Respondents assert that the Commission reasonably refused to institute rule making on Petitioner's reallocation request when it stated in the order complained of that it was pursuing a policy of instituting rule making proceedings only where the proposals for channel changes appeared to provide greater opportunities for television growth [whatever that is] and for effective competition among a greater number of stations, and that the requested reallocation of Channel 3 "would not conform to its interim allocation revision program." (Respondents' Brief, pp. 12-13)

C. The Commission's new policy of assigning television channels to promote effective competition does not supersede the statutory policy of assigning television channels fairly and equitably among the several states.

Petitioner has no interest in attacking the validity of the Commission's policy, announced in its Report and Order of June 26, 1956, of assigning television channels to promote effective competition among television stations. It is assumed, arguendo, that the policy is legitimate under the standard of public interest, convenience and necessity. However, there is no basis in reason or law to elevate this Commission-made policy above the statutory policy of Section 307(b) of the Communications Act, which requires that broadcast facilities be distributed fairly and equitably among the several states. At the very least, Petitioner was entitled to have the Commission weigh, in the order complained of, the statutory policy of Section 307(b) against the Commission's policy of promoting competition among television stations. There was no such consideration.

As heretofore pointed out, the Commission's policy of promoting effective competition among television stations is "interim" to nothing,

since the Commission did not adopt a long-range solution or plan, or program - but merely expressed a hope of all-UHF television operation - with respect to the over-all television problem. However, assuming arguendo that the Commission's "interim plan" was designed to avoid assignments which would interfere with the accomplishment of all-UHF television broadcasting sometime in the remote future, the Commission did not assert in the order complained of that the reallocation of Channel 3 requested by Petitioner would interfere in any way with the accomplishment of an all-UHF solution to the television problem.

As a matter of fact, contrary to the position of Respondents in their Brief (at p. 22), the so-called "Second Report on Deintermixture" of June 26, 1956 did not establish the policy and criteria of the "interim plan" as the exclusive technique for amending the assignments of television channels in Rule 3.606(b). The language of the Report and Order makes this clear, as follows:

"As already indicated, a basic choice in many markets at this time lies between the elimination of VHF channel assignments to create improved opportunities for UHF broadcasters and, alternatively, the assignment of additional VHF channels. Because of the widely varying circumstances in individual markets and the numerous factors which bear on the choice of techniques in any individual community or area, it is not possible to formulate rigid criteria whose perfunctory application to individual cases will automatically indicate the course which would best serve the public interest in each community during the interim period." (13 Pike & Fischer, Radio Regulation, 1581-2. Emphasis supplied.)

In aid of their general position in relation to the said Report and Order, Respondents rely on three completely inapposite cases to support their contention that the Commission's denial of Petitioner's rule making request was lawful: Logansport Broadcasting Co. v. United States, 93 U.S. App. D.C. 342, 210 F. (2d) 24; Coastal Bend Television Corp. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F. (2d) 686; and WIRL Television Co. v. United States, Cases No. 13768, 13769 and 13912, decided May 27, 1958.

In Logansport, this Court held that the Commission could allocate television channels by means of rule making as well as by adjudication upon applications. In Coastal Bend, the Court held that the Commission need not delay existing adjudicatory proceedings on VHF applications pending the outcome of rule making proceedings for deintermixture. In WIRL, the Court held that the Commission could deintermix Peoria after a rule making proceeding on that specific proposal, in which the appellant had the opportunity to demonstrate that the public interest required Channel 8 to remain in Peoria, among other things.

It is submitted that the three cases are not relevant to the question submitted here - whether the Commission erred in refusing to institute a rule making proceeding to assign Channel 3 to Atlantic City, New Jersey, on the basis of the facts and allegations before it.

For the reasons stated above, it must be concluded that the Commission's Report and Order of June 26, 1956 does not constitute a reasonable basis for denying Petitioner's rule making request.

II. RESPONDENTS' OTHER ARGUMENTS ARE SPECIOUS

Respondents argue that denial of rule making was justified because of the failure of Petitioner to show (by allegation) that Atlantic City rather than some other New Jersey city should be allocated Channel 3 or any other channel. Not only is this argument irrelevant to the basis relied on by Petitioner for rule making, but Respondents should be considered estopped from making the argument. On page 2 of Respondents' Brief, it is accurately stated that the Commission awarded more television channels (UHF) to Atlantic City than any other New Jersey City in the 1948-1952 allocation proceeding. Petitioner is content to accept this judgment of the Commission.

Respondents also complain that Petitioner did not show (by allegation) that Channel 3 should be moved out of Philadelphia in comparison with

all other channels which might have been requested to be moved out of New York or Philadelphia. Such a question would appear to be some ground for a counter proposal or an issue in a rule making proceeding; it has no relevance to the question of whether a rule making proceeding should be held on the basis of Petitioner's allegations. The speciousness of the complaint is revealed by Respondents' statement (Brief, p. 30) that any showing of preference among channels would be improper anyway.

III. INTERVENOR IS IN ERROR IN CONTENDING, APPARENTLY, THAT ANY STATEMENT OF REASONS FOR DENIAL OF PETITIONER'S REQUEST FOR RULE MAKING IS SUFFICIENT UNDER THE LAW.

Intervenor apparently contends, unlike Respondents, that any statement written in comprehensible language is sufficient basis for the denial of a rule making petition. (Intervenor's Brief, pp. 14-15) Thus, Intervenor argues that the Commission's action on "a similar argument" in Potomac Broadcasting Corp. (6 Pike & Fischer, Radio Regulation, 559) that the Commission had violated Section 4 (d) of the Administrative Procedure Act (60 Stat. 238, 5 U.S.C. Sec. 1003(d)), and Rules 1.701 and 1.702 of the Commission, is dispositive of identical contentions here. In the Potomac case the Commission stated that it is not compelled to undertake any rule making proceedings merely because a petition for rule making is filed. (Id., at 564) Petitioner agrees, but contends that it has made out a prima facie case in its petition which requires the Commission to institute a rule making proceeding or find substantitally better reasons for denying a proceeding than those advanced in the order complained of.

IV. INTERVENOR IS IN ERROR IN CONTENDING THAT PETITIONER IS NOT ENTITLED TO JUDICIAL REVIEW OF THE COMMISSION'S ORDER.

As an afterthought (not shared by Respondents), Intervenor raises a jurisdictional issue for the first time in its Brief - an issue not contained in the stipulation of issues filed with the Court in lieu of a prehearing conference. Intervenor's contention is based on allegations that (1) Petitioner is not a "party aggrieved" by the Commission's order; (2) the Commission's order was not a "final order" because it was negative rather than affirmatively amending an existing regulation; and (3) the denial of a petition for rule making is not reviewable.

(1) Petitioner is a "party aggrieved" by the Commission's Order denying rule making under Section 402(a) of the Communications Act and Section 4 of the Judicial Review Act of 1950. As the holder of a construction permit for a UHF television channel at Atlantic City, New Jersey, Petitioner's future in the broadcasting business is largely controlled by the outcome of the instant proceeding. The disposition of Petitioner's request for rule making will largely determine whether Petitioner will proceed with construction of the authorized UHF station, what degree of investment he will make in such a station, if built, whether to attempt to establish a "satellite" UHF station, whether to apply to the Commission for a VHF station at Atlantic City or elsewhere in New Jersey in place of a UHF station, or whether to seek some other form of relief or action from the Commission bearing on his future operation as a broadcaster. The Commission's official records show that Petitioner expended a substantial sum of money in acquiring his UHF construction permit for Atlantic City (Application file number BAPCT-87). Under the holding of the Supreme Court in United States v. Storer Broadcasting Company, 351 U.S. 192, and cases cited therein, Petitioner is a "party aggrieved" by the order complained of.

(2) The above statements also meet the contentions of Intervenor with respect to the status of the Commission's action as a "final order". (Intervenor's Brief, pp. 11-12)

(3) Intervenor contends that Petitioner is not entitled to judicial review under Section 10 of the Administrative Procedure Act on the basis of a statement in the Attorney General's Manual On The Administrative Procedure Act that denial of a petition for rule making under the Act is not subject to judicial review. The statement cites as authority the same expression of opinion by the Attorney General communicated in a letter to a Senate Committee.

Since the question raised by Intervenor is one of statutory interpretation, the interpretation and meaning of the statutory provision in the legislative process - rather than an interpretation by an executive or executive department of government - is conclusive. For this reason, there are set forth below in full the two definitive portions of legislative history pertinent to this case.

Following are the remarks of Mr. Francis E. Walter, Representative from Pennsylvania, to the House of Representatives on May 24, 1946, explaining part of Section 10 of the Administrative Procedure Act:

"Section 10 is a comprehensive statement of the right, mechanics, and scope of judicial review. It requires an effective, just, and complete determination of every case and every relevant issue. It is a means of enforcing all forms of law and all types of legal limitations. Every form of statutory right or limitation would thus be subject to judicial review under the bill. It would not be limited to constitutional rights or limitations alone - see Perkins v. Lukens Steel Co. (310 U.S. 113).

"Two general exceptions are made in the introductory clause of section 10. The first exempts all matters so far as statutes preclude judicial review. Congress has rarely done so. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial - see Stark v. Wickard, (321 U.S. 288 at p. 317).

"The second general limitation on the section is that there are exempted matters to the extent that they are by law committed to the absolute discretion of administrative agencies. There have been much misunderstanding and confusion of terms respecting the discretion of agencies. They do not have authority in any case to act blindly or arbitrarily. They may not willfully act or refuse to act. Although like trial courts they may determine facts in the first instance and determine conflicting evidence, they cannot act in disregard of or contrary to the evidence or without evidence. They may not take affirmative or negative action without the factual basis required by the laws under which they are proceeding. Of course, they may not proceed in disregard of the Constitution, statutes, or other limitations recognized by law." (Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946), page 368, 369. Emphasis supplied.)

On May 3, 1946, the House Committee on the Judiciary reported on Section 10 of the Administrative Procedure Act, as follows:

"Section 10 on judicial review does not apply in any situation so far as there are involved matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.

"This section requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings.

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board. The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

"Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him pro tanto from prevailing therein." (Id., at 275. Emphasis supplied.)

From the foregoing legislative history, it is clear that Intervenor's position with respect to reviewability under Section 10 of the Administrative Procedure Act is ill-taken.

Petitioner has noted other errors in the briefs of Respondents and Intervenor but believes them to be either self-revealing or subject to correction easily by reference to Petitioner's Brief.

CONCLUSION

The Commission's order complained of is contrary to law, and Petitioner prays that the Court reverse and set aside the order and remand the case to the Commission for further proceedings consistent with law.

Respectfully submitted,

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